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# COURT OF CUSTOMS<sup>c</sup> APPEALS REPORTS

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VOLUME I

CASES ADJUDGED  
IN THE UNITED STATES COURT  
OF CUSTOMS APPEALS

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APRIL, 1910, TO APRIL, 1911

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THOMAS H. CLARK

Reporter

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## UNITED STATES COURT OF CUSTOMS APPEALS.

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Presiding Judge:

Honorable ROBERT M. MONTGOMERY.

Associate Judges:

Honorable WILLIAM H. HUNT.<sup>1</sup>

Honorable JAMES F. SMITH.

Honorable ORION M. BARBER.

Honorable MARION DE VRIES.

Honorable GEORGE E. MARTIN.<sup>1</sup>

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Honorable GEORGE W. WICKERSHAM, Attorney General.

Honorable D. FRANK LLOYD,<sup>2</sup> Assistant Attorney General.

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ARTHUR B. SHELTON, Clerk.

CHARLES M. AYER, Assistant Clerk.

FRANK H. BRIGGS, Marshal.

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<sup>1</sup> Qualified as judge of the Commerce Court February 7, 1911. Hon. George E. Martin was appointed to succeed him and took the oath of office February 17, 1911.

<sup>2</sup> Deceased.



# TABLE OF CASES REPORTED.

	Page.		Page.
Acker v. United States.....	328	Hatters' Fur Exchange, United States v.....	198
Acker v. United States.....	404	Heckman, United States v.....	272
Akeltza v. United States.....	237	Herskovitz v. United States.....	289
American Sugar Refining Co. v. United States	228	Herskovitz v. United States.....	321
Athenia Steel & Wire Co. v. United States....	494	Hoffman v. United States.....	263
Austin v. United States.....	287	Hoffman Leroche Chem. Works, United	
Austin, Nichols & Co. v. United States.....	465	States v.....	276
Austin, Baldwin & Co. v. United States.....	510	Holbrook v. United States.....	263
Beer v. United States.....	484	Horrax, United States v.....	142
Beierle, United States v.....	457	Horsfield v. United States.....	138
Berst, United States v.....	51	Hygela Antiseptic Toothpick Co. v. United	
Best v. United States.....	49	States.....	497
Bischoff v. United States.....	293	Illfelder v. United States.....	109
Bliven v. United States.....	205	Illfelder & Co., United States v.....	527
Bockmann, United States v.....	25	Jackson, United States v.....	25
Bogle v. United States.....	144	Keveney v. United States.....	101
Borgfeldt, United States v.....	255	Kimpton, United States v.....	477
Borgfeldt, United States v.....	370	Klipstein v. United States.....	122
Briggs, executrix, v. United States.....	408	Klipstein v. United States.....	263
Burlington Venetian Blind Co. v. United		Knauth v. United States.....	178
States.....	374	Knauth v. United States.....	334
Burr v. United States.....	126	Knauth v. United States.....	422
Buschoff v. United States.....	336	Kraut v. United States.....	415
Carter v. United States.....	64	Krusi v. United States.....	168
Cauvigny Brush Co. v. United States.....	118	Kwong Yuen Shing v. United States.....	16
Central Westrumite Co., United States v....	400	Kwong Yuen Shing, United States v.....	14
Colman Co. v. United States.....	312	Lai Ming v. United States.....	5
Consolidated Kansas City S. & R. Co. v.		Lent & Co. v. United States.....	542
United States.....	472	Lichtenstein v. United States.....	79
Cordero, United States v.....	107	Loeb v. United States.....	385
Delepenha v. United States.....	113	Lunham v. United States.....	220
De Ronde v. United States.....	104	Lunham v. United States v.....	320
Downing v. United States.....	500	McBride v. United States.....	293
Downing, United States v.....	337	McConnell, United States v.....	73
Drakenfeld v. United States.....	216	McKesson v. United States.....	213
Drakenfeld, United States v.....	8	Magnus v. United States.....	166
Drakenfeld, United States v.....	216	Malouf v. United States.....	437
Fensterer v. United States.....	93	Mandel, United States v.....	223
Fenton v. United States.....	529	Mark Cross Co. v. United States.....	377
Fougere v. United States.....	146	Marsching v. United States.....	216
Franklin Sugar Refining Co. v. United States.	242	Marsching, United States v.....	8
Furuysa, United States v.....	341	Marsching, United States v.....	216
Gabriel, United States v.....	90	Martin v. United States.....	134
Gage, United States v.....	439	Marx, United States v.....	152
Gallagher v. United States.....	69	Masson v. United States.....	149
Germania Importing Co. v. United States....	101	Matagrín, United States v.....	309
Godillot v. United States.....	239	Mendelson v. United States.....	346
Gross v. United States.....	289	Michelin Tire Co., United States v.....	518
Gross v. United States.....	321	Moore v. United States.....	115
Grossfeld, United States v.....	189	Morris European & American Express Co.,	
Guthman v. United States.....	170	United States v.....	300
Habicht v. United States.....	10	Myers v. United States.....	226
Habicht, United States v.....	53	Myers, United States v.....	257
Hansen v. United States.....	1	Myers & Co. v. United States.....	506

	Page.		Page.
Oberle & Henry, United States <i>v.</i> .....	527	Shallus <i>v.</i> United States.....	556
Oelrichs <i>v.</i> United States.....	203	Shaw <i>v.</i> United States.....	426
Oil Seeds Co. <i>v.</i> United States.....	263	Siegle, United States <i>v.</i> .....	32
Pacific Crossotng Co. <i>v.</i> United States.....	312	Smith <i>v.</i> United States.....	489
Pantasote Co. <i>v.</i> United States.....	47	Sonneborn <i>v.</i> United States.....	443
Park & Tilford <i>v.</i> United States.....	34	Spielmann, United States <i>v.</i> .....	279
Peabody <i>v.</i> United States.....	113	Stegeman <i>v.</i> United States.....	208
Perkins, United States <i>v.</i> .....	323	Stein <i>v.</i> United States.....	36
Perry <i>v.</i> United States.....	415	Stein <i>v.</i> United States.....	478
Petru American Importing Co. <i>v.</i> United States.....	106	Stiner & Son <i>v.</i> United States.....	545
Pierce <i>v.</i> United States.....	171	Stone & Downer Co. <i>v.</i> United States.....	513
Pisani, United States <i>v.</i> .....	25	Strakosh <i>v.</i> United States.....	360
Prosser <i>v.</i> United States.....	29	Sun Kwong On <i>v.</i> United States.....	17
Prosser, United States <i>v.</i> .....	22	Sussfeld, United States <i>v.</i> .....	51
Prosser & Son <i>v.</i> United States.....	550	Swan <i>v.</i> United States.....	263
Reading, United States <i>v.</i> .....	515	Talbot <i>v.</i> United States.....	415
Reiss <i>v.</i> United States.....	239	Tate, United States <i>v.</i> .....	434
Richard <i>v.</i> United States.....	360	Taxis <i>v.</i> United States.....	92
Richards, United States <i>v.</i> .....	537	Thomas <i>v.</i> United States.....	86
Riebe, United States <i>v.</i> .....	19	Tilge <i>v.</i> United States.....	462
Robertson, United States <i>v.</i> .....	379	Traitel Marble Co., United States <i>v.</i> .....	25
Robins <i>v.</i> United States.....	252	Tuska & Co. <i>v.</i> United States.....	535
Roesler & Hasslach Chem. Co. <i>v.</i> United States.....	290	Ullman <i>v.</i> United States.....	61
Rosenstein, United States <i>v.</i> .....	304	United Cigar Stores Co., United States <i>v.</i> .....	450
Rossano <i>v.</i> United States.....	237	Vandiver <i>v.</i> United States.....	194
Rossman <i>v.</i> United States.....	280	Vietor, United States <i>v.</i> .....	297
Rossman, United States <i>v.</i> .....	25	Vitelli <i>v.</i> United States.....	237
Rossman Co. <i>v.</i> United States.....	280	Waterhouse, United States <i>v.</i> .....	353
Rotograph Co. <i>v.</i> United States.....	82	Weber <i>v.</i> United States.....	1
Saito <i>v.</i> United States.....	132	Welch <i>v.</i> United States.....	263
Salomon, United States <i>v.</i> .....	246	Wells, Fargo & Co., United States <i>v.</i> .....	158
Seattle Brewing Co., United States <i>v.</i> .....	362	Wolf <i>v.</i> United States.....	181
Shallus <i>v.</i> United States.....	316	Woolworth <i>v.</i> United States.....	120
		Yamashita, United States <i>v.</i> .....	341
		Zimmerman <i>v.</i> United States.....	79



# TABLE OF CASES CITED IN OPINIONS.

	Page.		Page.
Adams v. Bancroft; 1 Fed. Cases, 84.....	162	Blankensteyn, in re; 56 Fed. Rep., 474.....	20, 27
Almy v. California; 24 How., 169.....	292	Blumenthal v. Berkshire Life Ins. Co.; 134 Mich., 216.....	116
Altman, United States v.; 107 Fed. Rep., 15.	225	Blumenthal v. United States; 72 Fed. Rep., 48.....	81, 112
American Express Co., United States v.; 177 Fed. Rep., 735.....	245	Bockmann v. United States; 158 Fed. Rep., 807.....	26
Am. Mutoscope & Blog. Co. v. Edison Mfg. Co.; 137 Fed. Rep., 262.....	52	Bogle v. Magone; 40 Fed. Rep., 226.....	174
Am. Net & Twine Co. v. Worthington; 141 U. S., 468.....	202, 446	Bogle v. Magone; 152 U. S., 623.....	175
American Sugar Refining Co. v. United States; 1 Ct. Custs. Appls., 228.....	464	Boker v. United States; 140 Fed. Rep., 115.....	68
American Sugar Refining Co. v. United States; 211 U. S., 155.....	231	Borden v. United States; 132 Fed. Rep., 205.....	222
Arnold, United States v.; 24 Federal Cases, 872.....	108	Borgfeldt v. United States; 124 Fed. Rep., 457.....	372
Arnold v. United States; 147 U. S., 494.....	171	In re Borgfeldt; 65 Fed. Rep., 791.....	373
Arnold v. United States; 13 U. S., 119.....	417	Boske v. Comingore; 177 U. S., 459.....	222
Arthur v. Butterfield; 125 U. S., 70.....	254, 340	Brauss & Co. v. United States; 120 Fed. Rep., 1017.....	263
Arthur v. Lahey; 96 U. S., 112.....	446	Brewer, United States v.; 92 Fed. Rep., 341.....	222
Arthur v. Sussfeld; 96 U. S., 128.....	254	Brewer, United States v.; 92 Fed. Rep., 343.....	359
Arthur v. Swan; 103 U. S., 597.....	333	Bromley, v. United States; 156 Fed. Rep., 958.....	555
Arthur v. Unkart; 96 U. S., 118.....	15, 140, 148	Brownell, United States v.; 166 Fed. Rep., 1022.....	131
Auffmordt v. Hedden; 137 U. S., 310.....	186, 398	Buehne Steel Wool Co. v. United States; 159 Fed. Rep., 107.....	84
Austin v. United States; 1 Ct. Custs. Appls., 287.....	329	Brown v. Piper; 91 U. S., 37, 40.....	85
Austin v. United States; 1 Ct. Custs. Appls., 465.....	478	Buffalo Natural Gas Co., United States v.; 172 U. S., 339.....	162
Austin Baldwin & Co. v. United States; 144 Fed. Rep., 702.....	511	Burnette, in re; 73 Kansas, 609.....	211
Austin, Nichols & Co. v. United States; 171 Fed. Rep., 79.....	466, 467, 470	Buttfield v. Stranahan; 192 U. S., 470.....	245
Atty. General v. R. R. Co.; 28 N. C., 456.....	66	Cadwalader v. Jessup & Moore Paper Co.; 149 U. S., 350.....	524, 526
Auto Import Co., United States v.; 168 Fed. Rep., 242.....	36	Cadwalader v. Zeh; 151 U. S., 171.....	256
Bader v. United States; 116 Fed. Rep., 541.....	460	Carter v. United States; 1 Ct. Custs. Appls., 64.....	80, 83, 207
Badger v. Cusimano; 130 U. S., 39.....	187	Carter, Webster & Co. v. United States; 143 Fed. Rep., 256.....	7
Banking Co. v. Smith; 128 U. S., 174.....	310	Cattus, United States v.; 167 Fed. Rep., 532.....	111
Ballard v. Thomas; 19 Howard, 382.....	63	Cause Manufacturing Co. v. United States; 151 Fed. Rep., 4.....	4, 332
Barber v. Schell; 107 U. S., 617.....	219, 332	Cheatham v. United States; 92 U. S., 85.....	397
Bartlett v. Kane; 16 Howard, 263.....	187	Chew Hing Lung v. Wise; 176 U. S., 156.....	202
Bartram Bros., United States v.; 131 Fed. Rep., 833.....	231	Clafin, in re; 47 Fed. Rep., 875.....	207
Bartram Bros. v. United States; 123 Fed. Rep., 327.....	231	Clafin, in re; 113 Fed. Rep., 944.....	67
Bates Refrig. Co. v. Sulzberger; 157 U. S., 1.....	219	Clafin & Co. v. United States; 109 Fed. Rep., 562.....	75
Baumgarten v. Magone; 50 Fed. Rep., 71.....	262	Clafin v. Robertson; 38 Fed. Rep., 92.....	333
Bayersdorfer, United States v.; 175 Fed. Rep., 959.....	339	Colby & Co., United States v.; 153 Fed. Rep., 883.....	514
Beer, United States v.; 150 Fed. Rep., 560.....	395	Coles v. Collector; 100 Fed. Rep., 442.....	219
Belcher v. Linn; 24 How., 508.....	187	Commonwealth v. Schollenberger; 27 Atl. Rep., 30.....	345
Bennett, United States v.; 66 Fed. Rep., 299.....	273	Converse v. Burgess; 59 U. S. (18 How.), 413.....	45, 396
Benson v. United States; 159 Fed. Rep., 118.....	305	Converse v. Burgess; 112 U. S., 495.....	66
Berbecker v. Robertson; 152 U. S., 373.....	15	Cordero, United States v.; 1 Ct. Custs. Appls., 107.....	418
Berlinger, United States v.; 167 Fed. Rep., 800.....	339	Cramer v. Arthur; 102 U. S., 612.....	244
Bertram v. Robertson; 122 U. S., 116.....	430		
Bird, United States v.; 167 Fed. Rep., 319.....	33		

	Page.		Page.
Cruikshank, in re; 54 Fed. Rep., 676.....	122	Hadden v. Merritt; 115 U. S., 25.....	245
Cushman Co. v. Goddard; 95 Fed. Rep., 664..	86	Hahn v. United States; 100 Fed. Rep., 635....	98, 99
Dana, United States v.; 99 Fed. Rep., 433.....	98	Haley v. State; 80 N. W. Rep., 362.....	345
De Forest v. Lawrence; 13 How., 274.....	332	Hammond v. United States; 1 Estee's Ha- wallan Repts., 344.....	225
Delapenha v. United States; 1 Ct. Custs. Appls., 113.....	145	Harris v. United States; 177 Fed. Rep., 475..	204
Devoy v. United States; 147 Fed. Rep., 765..	435	Hartranft v. Meyer; 135 U. S., 237.....	254
Dieckerhoff v. Robertson; 44 Fed. Rep., 160..	15, 308	Hartranft v. Oliver; 125 U. S., 525.....	193
Dickson, United States v.; 15 Pet., 141.....	121	Hartranft v. Sheppard; 125 U. S., 337.....	361
Dingledstedt v. United States; 91 Fed. Rep., 112.....	96	Hartranft v. Weigmann; 121 U. S., 609.....	52, 162, 282, 312, 485, 522, 527
Dominici, United States v.; 78 Fed. Rep., 334..	222	Hardt, Von Bernuth Co. v. United States; 146 Fed. Rep., 61.....	89
Dooley v. United States; 182 U. S., 222.....	57, 399	Hartwell Lumber Co., United States v.; 142 Fed. Rep., 432.....	418
Downing, in re; 45 Fed. Rep., 412.....	81	Hasard v. United States; 175 Fed. Rep., 967..	106
Downing, v. United States; 99 Fed. Rep., 423..	153	Hedden v. Richard; 149 U. S., 346.....	24
Downing, United States v.; 201 U. S., 354.....	97, 301	Helmraath, United States v.; 135 Fed. Rep., 912.....	359
Dudley, United States v.; 174 U. S., 670.....	24, 534	Hempstead & Son v. United States; 158 Fed. Rep., 584.....	96
Dwight v. Merritt; 140 U. S., 219.....	117	Hensel v. United States; 160 Fed. Rep., 219..	67
Earle Bros. v. United States; 153 Fed. Rep., 773.....	253	Herman, United States v.; 91 Fed. Rep., 116..	37
Edison v. American Mutoscope Co., 114 Fed. Rep., 926.....	52	Hesse, United States v.; 158 Fed. Rep., 407..	93
Edison v. American Mutoscope & Biograph Co.; 151 Fed. Rep., 767.....	52	Higgins, in re; 55 Fed. Rep., 278.....	251
Edison v. Lubin; 122 Fed. Rep., 240.....	52	Hiller v. United States; 106 Fed. Rep., 73....	376
Eldman v. Martinez; 184 U. S., 578.....	52, 202	Hilton v. Merritt; 110 U. S., 97.....	186, 187
Elmer v. United States; 87 Fed. Rep., 202.....	222	Horrax, United States v.; 1 Ct. Custs. Appls., 142.....	541
Erhardt v. Schroeder; 155 U. S., 124.....	15, 148, 393, 396, 479, 482	Hossler v. Hartman; 82 Pa. St., 53.....	296
Erlanger, Blumgart & Co. v. United States; 154 Fed. Rep., 949.....	463	Hummert v. Schwab; 54 Ill., 142.....	296
Eschwege, United States v.; 98 Fed. Rep., 600..	120	Hunter v. United States; 121 Fed. Rep., 207..	103
Ferry v. United States; 85 Fed. Rep., 550....	58, 245	Hutton v. Schell; 12 Fed. Cases, 1095.....	292
Field v. Clark; 143 U. S., 649.....	428	Irvine v. Redfield; 22 How., 170.....	291
Fink v. United States; 170 U. S., 584.....	403	Isaacs v. Jonas; 148 U. S., 648.....	35, 197, 424
Forman v. Peaslee; 9 Fed. Cases, 452.....	292	Jaecel & Sons v. United States; 172 Fed. Rep., 292.....	7
Foster v. Neilson; 2 Pet., 253.....	429	Jessop & Moore Paper Co. v. Cooper; 46 Fed. Rep., 186.....	514
Frazee v. Moffitt; 20 Blatch., 267.....	522	Johnson, United States v.; 152 Fed. Rep., 164..	13
French v. Edwards; 13 Wall., 506.....	480	Johnson, in re; 56 Fed. Rep., 822.....	176, 305, 344
Frits v. United States; 135 Fed. Rep., 916....	225	Karthauss v. Frick; Fed. Case, 7615.....	310
Gallagher v. United States; 1 Ct. Custs. Appls., 69.....	419	Kauffman v. United States; 128 Fed. Rep., 468.....	7
Gardner, in re; 72 Fed. Rep., 464.....	283, 509	Kauffmann Bros. v. United States; 99 Fed. Rep., 430.....	305, 344
Garrison, Wright & Co. v. United States; 121 Fed. Rep., 149.....	93	Kenworthy, United States v.; 68 Fed. Rep., 904.....	37
Georgia Banking Co. v. Smith; 128 U. S., 174..	7	Keppelmann v. United States; 116 Fed. Rep., 777.....	33
Gibb v. Washington; 10 Fed. Cases, 288.....	292	Kimball v. Collector; 10 Wallace, 436.....	62
Gibson v. Stevens; 49 U. S., 383.....	407	Kimpton, United States v.; 1 Ct. Custs. Appls., 477.....	466
Goldenberg v. United States; 130 Fed. Rep., 108.....	93	Kimpton v. United States; 171 Fed. Rep., 78.....	467, 478
Goldenberg v. United States; 152 Fed. Rep., 658.....	93	Klingenberg, United States v.; 153 U. S., 93..	245
Grant v. Peaslee; 9 Fed. Cas., 1143.....	455	Knauth, Nachod & Kuhne v. United States; 155 Fed. Rep., 144.....	423, 425
Graser-Rothe, United States v.; 164 Fed. Rep., 205.....	281, 285	Koechl v. United States; 91 Fed. Rep., 110..	81
Griswold v. Maxwell; 11 Fed. Cas., 5838.....	455	Komada v. United States; 215 U. S., 392.....	73, 172
Greely's admr. v. Burgess; 59 U. S. (18 How.), 413.....	187, 394, 397	Kraut v. United States; 142 Fed. Rep., 1037..	425
Greely v. Thompson; 10 How., 225.....	187	Kreshower v. United States; 152 Fed. Rep., 485.....	338
Grossfeld, United States v.; 1 Ct. Custs. Appls., 189.....	417	Krusi v. United States; 1 Ct. Custs. Appls., 168.....	325
Guckenheimer v. Sellers; 81 Fed. Rep., 997..	345	La Petra, United States v.; 172 Fed. Rep., 297.....	327
Guggenheim Smelting Co., in re; 121 Fed. Rep., 153.....	120		
Habicht v. United States; 1 Ct. Custs. Appls., 10.....	145		

## TABLE OF CASES CITED IN OPINIONS.

IX

	Page.		Page.
Lai Ming v. United States; 1 Ct. Custs. Appls., 5 .....	121, 310	Murphy v. United States; 162 Fed. Rep., 871.	512
Lamb v. Robertson; 38 Fed. Rep., 716 .....	308	Murphy, United States v.; 136 Fed. Rep., 811.	483
Landram v. United States; 16 Ct. Clms. Repts., 74 .....	235	Muser v. Magone; 155 U. S., 240 .....	37, 488
Lawder v. Stone; 187 U. S., 281 .....	56	Mustin v. Cadwalader; 123 U. S., 369 .....	187
Lawrence v. Allen; 48 U. S., 785 .....	533	Myers v. United States; 110 Fed. Rep., 940 ..	263
Lawrence, United States v.; 137 Fed. Rep., 466	152	Myers v. United States; 163 Fed. Rep., 53 ...	508
Lawrence Johnson & Co. v. United States; 124 Fed. Rep., 1000 .....	274	Myers, United States v.; 146 Fed. Rep., 648 ..	359
Lawrence Johnson & Co. v. United States; 140 Fed. Rep., 118 .....	274	Newman v. Arthur; 109 U. S., 132 .....	332
Lawrence Johnson & Co. v. United States; 159 Fed. Rep., 189 .....	274	Newman v. United States; 159 Fed. Rep., 123 .....	24
Legg v. Hedden; 37 Fed. Rep., 861 .....	81	Newman Wire Co., United States v.; 152 Fed. Rep., 488 .....	24
Legg, United States v.; 105 Fed. Rep., 930 ..	191, 417	N. Y. Merchandise Co., United States v.; 167 Fed. Rep., 684 .....	457
Leggett, United States v.; 66 Fed. Rep., 300.	153, 310	Nichols v. United States; 7 Wall., 126 ..	57, 58, 212, 399
Leigh, United States v.; 159 Fed. Rep., 314 ..	36	Nichols, United States v.; 186 U. S., 298 ..	466, 478
Lelsy v. Hardin; 135 U. S., 110 .....	345	Nix v. Hedden; 149 U. S., 304 .....	85, 175, 177
Levy v. Robertson; 38 Fed. Rep., 714 .....	330	Nordlinger, United States v.; 121 Fed. Rep., 690 .....	330
Lichtenstein v. United States; 154 Fed. Rep., 736 .....	7	Oberteuffer v. Robertson; 116 U. S., 499 .....	187
Littlejohn v. United States; 119 Fed. Rep., 484 .....	522	Oelbermann v. Merritt; 123 U. S., 356 ..	187, 396, 462
Loeb, United States v.; 107 Fed. Rep., 692 ..	44, 396	Ogden v. Maxwell; 3 Blatchford, 319 .....	40
Loeb v. United States; 1 Ct. Custs. Appls., 385 .....	462	One Pearl Necklace, United States v.; 111 Fed. Rep., 164 .....	137
Lothrop v. United States; 164 Fed. Rep., 99.	68	Origet v. Hedden; 155 U. S., 228 .....	186, 388
Lueder, United States v.; 154 Fed. Rep., 1 ..	464	Pantasote Co. v. United States; 1 Ct. Custs. Appls., 47 .....	139
Lunham v. United States; 1 Ct. Custs. Appls., 220 .....	296	Park & Tilford v. United States; 1 Ct. Custs. Appls., 34 .....	424
McCahan Sugar Ref. Co. v. Steamship Wildcroft; 195 U. S., 635 .....	231	Passavant v. United States; 148 U. S., 244 ..	488
McKesson v. United States; 113 Fed. Rep., 997 .....	522	Passavant, United States v.; 169 U. S., 16 ..	37,
Maddock v. Magone; 162 U. S., 368 .....	15, 162, 333		44, 45, 187
Magone v. Heller; 150 U. S., 70 .....	335	Passavant, United States v.; 154 Fed. Rep., 1005 .....	327
Magone v. Luckemeyer; 139 U. S., 612 .....	225	Patterson & Co. v. United States; 166 Fed. Rep., 733 .....	89
Magone v. Wiederer; 159 U. S., 555 ..	143, 197, 385, 500	Paturel v. Robertson; 41 Fed. Rep., 329 .....	117
Maillard v. Lawrence; 16 How., 251 .....	332	Pennington v. Cox; 2 Cranch, 33 .....	72
Manning v. Keenan; 73 N. Y., 45 .....	311	Phillips, United States v.; 46 Fed. Rep., 466 ..	483
Manson v. Williams; 213 U. S., 453 .....	271	Pickhardt v. Merritt; 132 U. S., 257 .....	131
Martindale v. Cadwalader; 42 Fed. Rep., 403 ..	315	Pickhardt v. United States; 67 Fed. Rep., 111.	148
Mathews, United States v.; 78 Fed. Rep., 345.	36	Pinney, Casse & Lackey Co., United States v.; 105 Fed. Rep., 934 .....	559
Maxwell v. Griswold; 51 U. S. (10 Howard), 242 .....	38, 44, 46	Prosser v. United States; 1 Ct. Custs. Appls., 22 .....	555
Megros v. United States; 53 Fed. Rep., 244 ..	225	Prosser v. United States; 1 Ct. Custs. Appls., 29 .....	555
Meier, United States v.; 136 Fed. Rep., 764 ..	24	Ranlett & Stone, United States v.; 172 U. S., 133 .....	15, 319, 359, 369, 393, 396, 482
Mendelson v. United States; 154 Fed. Rep., 33 .....	352	Reed, ex parte; 100 U. S., 13 .....	222
Menzel v. United States; 142 Fed. Rep., 1038.	3	Reimer v. Schell; 4 Blatch., 328 .....	219
Meredith v. United States; 13 Pet., 404 .....	108	Reiss & Brady v. United States; 135 Fed. Rep., 248 .....	240
Merritt, United States v.; 123 U. S., 356 ..	44	Reiss & Brady, United States v.; 136 Fed. Rep., 741 .....	13, 331, 332
Meyer v. Cadwalader; 89 Fed. Rep., 963 .....	143	Reiss & Brady, United States v.; 166 Fed. Rep., 746 .....	13, 240
Millar v. Millar; 17 Fed. Cas., 9546 .....	455	Riebe, United States v.; 1 Ct. Custs. Appls., 19 .....	27, 284, 515, 529
Mills v. United States; 109 Fed. Rep., 564 ..	75	Riggs, United States v.; 203 U. S., 137 .....	165
Moore & Co. v. United States; 1 Ct. Custs. Appls., 115 .....	298	Robertson v. Frank; 132 U. S., 17 .....	41, 44, 46, 187
Morimura v. United States; 167 Fed. Rep., 687 .....	536	Robertson v. Rosenthal; 132 U. S., 460 .....	461
Morningstar, United States v.; 168 Fed. Rep., 541 .....	131	Roessler Co., in re; 49 Fed. Rep., 272 .....	167
Morris v. United States; 140 Fed. Rep., 774 ..	24	Roessler Co., in re; 56 Fed. Rep., 481 .....	167
Morrison v. Muller; 37 Fed. Rep., 82 .....	308	Roessler, United States v.; 137 Fed. Rep., 770 ..	161
Morrison v. United States; 107 Fed. Rep., 113.	143		

	Page.		Page.
Rosenwald, United States v.; 67 Fed. Rep., 323.....	15, 148	Sun Kwong On v. United States; 143 Fed. Rep., 115.....	140
Ross, United States v.; 91 Fed. Rep., 108....	156	Swan v. Arthur; 103 U. S., 597.....	249
Rossman, United States v.; 1 Ct. Custs. Appls., 280.....	425	Swan v. Finch; 113 Fed. Rep., 243.....	125
Rothschild v. United States; 179 U. S., 463....	225	Swan & Finch Co. v. United States; 190 U. S., 143.....	52
Salambier, United States v.; 170 U. S., 621....	66	Swayne v. Hager; 37 Fed. Rep., 780.....	120
Salomon Bros., United States v.; 1 Ct. Custs. Appls., 246.....	522	Swift & Co. v. United States; 111 U. S., 22....	39
Saltonstall v. Wiebusch; 156 U. S., 601.....	552, 554	Symonds, United States v.; 120 U. S., 46.....	222
Sampson v. Peaslee; 20 How., 571.....	291	Tate, United States v.; 1 Ct. Custs. Appls., 434.....	424
Schall v. United States; 147 Fed. Rep., 780; 154 Fed. Rep., 1005.....	114	Thanhauser v. United States; 159 Fed. Rep., 228.....	111
Schering, United States v.; 123 Fed. Rep., 65. 48, 140		The Peggy, United States v.; 1 Cranch, 103....	429
Schering, United States v.; 163 Fed. Rep., 246..	131	Thomas, United States v.; 178 Fed. Rep., 602..	319
Schiff, United States v.; 139 Fed. Rep., 549....	460	Thomson v. Maxwell; 23 Fed. Cases, 1100....	148
Schillinger v. United States; 155 U. S., 166.....	58, 212, 399	Tidewater Oil Co. v. United States; 171 U. S., 216.....	533
Schmidt v. Badger; 107 U. S., 85.....	156	Tiffany v. United States; 112 Fed. Rep., 672..	98
Schoellkopf, United States v.; 146 Fed. Rep., 56.....	206, 444	Train v. United States; 113 Fed. Rep., 1020..	125
Schoenmann v. United States; 119 Fed. Rep., 584.....	98	Two hundred chests of tea, Smith claimant; 22 U. S., 428.....	256
Schoverling, United States v.; 146 U. S., 76....	35	Vandiver v. United States; 156 Fed. Rep., 961.....	148
Scott, Reid v.; 10 Peters, 524.....	219	Vantine & Co. v. United States; 159 Fed. Rep., 289; 166 Fed. Rep., 751.....	512
Scott & West, United States v.; 104 Fed. Rep., 285.....	103	Vantine, United States v.; 166 Fed. Rep., 735..	299
Seeberger v. Cahn; 137 U. S., 97.....	332	Vincent v. German Ins. Co.; 120 Iowa, 272....	398
Seeberger v. Farwell; 139 U. S., 608.....	225	Von Bremen v. United States; 168 Fed. Rep., 889.....	177
Seeberger v. Schlesinger; 152 U. S., 581.....	256, 340	Vowell, United States v.; 5 Cranch, 368.....	108
Seeberger v. Wright & Lawther Co.; 157 U. S., 183.....	318	Waddell v. United States; 124 Fed. Rep., 301..	98
Shea, Smith & Co., United States v.; 114, Fed. Rep., 38.....	67	Wanamaker v. Cooper; 69 Fed. Rep., 465....	36
Shing Shun & Co., United States v.; 173 Fed. Rep., 844.....	219	Wanamaker v. United States; 175 Fed. Rep., 900.....	89
Sidenberg v. Robertson; 41 Fed. Rep., 763....	333	Wayman v. Southard; 10 Wheat., 1.....	121
Sixty-seven Packages, United States v.; 17 How., 85.....	62	Well v. United States; 115 Fed. Rep., 592....	359
Smith v. Schell; 27 Fed. Rep., 648.....	207	Wells, United States v.; 77 Fed. Rep., 411....	124
Smith v. Whitney; 116 U. S., 167.....	222	Wells, Fargo & Co., United States v.; 1 Ct. Custs. Appls., 158.....	250
Sonn v. Magone; 159 U. S., 417.....	161, 308	White v. United States; 69 Fed. Rep., 93.....	514
Steinhardt & Bro., United States v.; 126 Fed. Rep., 443.....	197, 335	Whitney v. Robertson; 124 U. S., 190.....	431
Steinhardt & Bro., United States v.; 141 Fed. Rep., 494.....	51	Whitridge, United States v.; 197 U. S., 135....	310
Stairs v. Peaslee; 18 How., 521.....	446	Wigglesworth, United States v.; 2 Story, 369..	312
Standard Varnish Works v. United States; 59 Fed. Rep., 456.....	251	Wilson, United States v.; 1 Hunt's Mer. Mag., 167.....	522
Stern v. United States; 105 Fed. Rep., 937....	376	Wing, United States v.; 167 Fed. Rep., 317....	94
Stewart v. United States; 113 Fed. Rep., 928..	308	Wing, United States v.; 119 Fed. Rep., 479....	98
Strauss, United States v.; 136 Fed. Rep., 185-7.	111	Wolf v. United States; 1 Ct. Custs. Appls., 181.....	413
Strohmeyer & Arpe Co., United States v.; 167 Fed. Rep., 533.....	18, 238	Worthington v. Robbins; 139 U. S., 337. 117, 197, 496	
Strother v. Lucas; 12 Pet., 410.....	429	Wright v. United States; 127 Fed. Rep., 1022..	461
		Yeaton v. Lenox; 32 U. S., 220.....	289
		Ystallifera Iron Co. v. Redfield; 23 Fed. Rep., 650.....	395

## CASES ADJUDGED IN THE UNITED STATES COURT OF CUSTOMS APPEALS.

HANSEN *v.* UNITED STATES (No. 18). WEBER *v.* UNITED STATES  
(No. 123).<sup>1</sup>

STURGEON ROE "PREPARED FOR PRESERVATION" NOT "PRESERVED."

Fresh roe of the sturgeon rubbed through a sieve, dropping thence into a solution of brine, the brine drawn off and the roe packed for shipment in tins and transported in a refrigerated state, does not constitute "fish roe preserved for food purposes," as excepted by paragraph 549, tariff act of 1897, and was not dutiable under paragraphs 258 and 261 of said act, but as eggs of fish under paragraph 549.

United States Court of Customs Appeals, June 22, 1910.

APPEALS from Circuit Court of the United States for Southern District of New York  
(T. D. 29914).

[Reversed.]

*John Gibbon Duffy* (*Joseph G. Kammerlohr* of counsel), for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

These are appeals from the Circuit Court of the United States for the Southern District of New York. The decision of the circuit court affirmed the decision of the Board of United States General Appraisers, G. A. 6922 (T. D. 29914), which had affirmed the assessment of duty by the collector of customs at the port of New York on goods imported by the appellants. The goods consisted of so-called "fresh caviar." The importations were in part in barrels and in part in tins. The barrels contained about 100 pounds each, whilst the tins were in from 1 to 3 pound packages. The collector imposed a duty upon the merchandise in the barrels at the rate of three-fourths of 1 cent per pound under the provisions of paragraph 261 of the tariff act of 1897, and upon the caviar in tins at the rate of 30 per cent ad valorem under the provisions of paragraph 258 of the same act. The pertinent provisions of said paragraphs are as follows:

258. Fish \* \* \*. All other fish (except shellfish), in tin packages, thirty per centum ad valorem; \* \* \*

261. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; \* \* \*

<sup>1</sup> Reported in T. D. 30769 (19 Treas. Dec., 765).

Counsel for the Government maintained that while the merchandise was not directly dutiable under the provisions of either of the quoted paragraphs, nevertheless it was properly dutiable thereunder by virtue of the similitude clause and the familiar provisions of section 7 of the tariff act of 1897. Counsel for the importer, among other things which are deemed unimportant, claim that the merchandise was entitled to free entry under the provisions of paragraph 549, free list of the tariff act of 1897, which, in so far as pertinent, reads :

549. Eggs of birds, fish, and insects : *Provided, however,* That this shall not be held to include \* \* \* fish roe preserved for food purposes.

The Board of General Appraisers affirmed the assessment of duty by the collector, and the Circuit Court for the Southern District of New York affirmed the decision of the board. The board found upon the facts that the merchandise was "fish roe preserved for food purposes," and that it was therefore excluded from the provisions of paragraph 549 by reason of the exception thereto quoted. Much testimony was introduced at the hearing, so that the production, preparation, and methods of treating the roe from the time it is taken from the fish abroad until the time it reaches and is served upon the table in this country is fully developed. The record presents no controversy as to the facts of the case, and in that view the question for determination by this court is essentially one of law, upon an agreed statement of facts, as to whether or not the undisputed condition and treatment of this merchandise brings it within the terms of paragraph 549 of the free list of the tariff act of 1897, or requires that it be excluded therefrom perforce the proviso thereto and held dutiable under the pertinent provisions of paragraphs 261 and 258, respectively.

It appears from the record that the merchandise is made from the roe of the sturgeon. In the particular case the sturgeon were taken from the Caspian Sea; they were then cut open, the roe taken out and cut into so-called blocks. Thereupon these blocks of roe were rubbed in a sieve, so as to separate the individual fish eggs one from the other, and the whole from the other matter, consisting of tissue and blood, which held them together, as taken from the body of the fish. They were rubbed through a sieve, and as they passed through dropped into a solution of brine 10 or 12 per cent strong. The testimony discloses, without controversy, that the brine, as there used, is for the purpose of hardening the eggs, which otherwise, by reason of their soft and frangible condition, could not be successfully packed in either barrels or tins. After the application of the brine for the hardening purpose stated the latter is drawn away, the eggs dried by heat, and then packed with only those remaining particles of brine about it which naturally adhere. In this condition they are ready for shipment. They are immediately put into refrigerators and shipped to this country in refrigerated transportation facilities. It appears

that in transit the merchandise in tins is repacked in London. It is undisputed from the evidence that transportation of the merchandise other than in a refrigerated condition could not be successfully accomplished. There is no agency of preservation accomplished by the use of the salt sufficient even for the purpose of transportation, which fact would seem to conclusively indicate that if the salt were intended as a preservative it signally fails in that office. However, while it would be insufficient for a preservative in transit without the application of the refrigerating processes, the application of the refrigerating processes alone without the salt would be a sufficient preservative, not alone for the purpose of transportation, but until the merchandise enters into consumption. The real and potent agency of preservation is refrigeration, and not the salt or brine.

Upon arrival in this country and being taken from the vessel, the so-called caviar or fish roe is immediately placed in cold storage, and without that it would in a very brief space of time decay. It appears from the record that at least 80 per cent of the merchandise is then taken out of the large casks and tins and subjected to a so-called pasteurizing process. To do so it is put into small glass jars, holding not more than one or two wineglasses of the material, hermetically sealed, and then subjected to a steam bath up to 150° F. for a period of approximately 10 minutes. In this condition it is guaranteed, under the language of the label of the containers, to keep in any climate, and the testimony amply supports the verity of that warranty. In this condition no refrigeration or other processing is necessary to maintain a sound condition. The remaining percentage finds its way into commerce and consumption in the tin containers. Usually the tins, or always, in order to keep the same from decay, are subjected to a refrigeration process close to freezing, to wit, 32° F., as is the degree of refrigeration required from the time it leaves the point of production.

The sole issue for determination by this court is one of law, upon a given state of facts, and that whether or not this merchandise as imported can be held to be "preserved" for food purposes within the proviso of paragraph 549.

Some light is thrown upon the import to be given the word "preserved" in paragraph 549 by reading it in connection with paragraph 261. It will be noted that paragraph 261 enumerates various methods of preparation for and preservation of fish, within which term roe is included for dutiable purposes by similitude (*Menzel v. United States*, 142 Fed. Rep., 1038), and then generalizes upon these methods in the following language, "packed in ice or otherwise prepared for preservation."

Manifestly, Congress used the words "or otherwise prepared for preservation" as coextensive with the words "packed in ice," and

we can not escape the conclusion forced upon us by this disjunctive coalition by Congress that treatment by ice or the refrigeration process was deemed by Congress to be one of the methods of "*preparation* for preservation" and not the "preservation" of such merchandise.

Paragraph 549, on the other hand, in the language by which it is said to exclude this merchandise therefrom speaks of "fish roe *preserved* for food purposes." Reading the two paragraphs together, it would appear that Congress contemplated the two conditions of fish roe or fish, one prepared for preservation, for example, by being packed in ice or refrigerated, and the other actually preserved, which is the condition contemplated by paragraph 549 in order to be excluded therefrom, and that fish roe could be "prepared for preservation" and yet fall short of the status known as "preserved," as used in paragraph 549.

Undoubtedly the fish roe in this case was prepared for preservation within purview of paragraphs 258 and 261, by being cleansed and possibly hardened with the salt and refrigerated, but we can not hold that it was "preserved for food purposes" so as to exclude it from paragraph 549, when its agreed condition here is plainly assigned a different statutory status by Congress. The exact contrary is a logical result. In the presence of another statutory status in cognate provisions of the law, plainly applicable to merchandise, the intention of Congress seems clear not to have intended to include them in a different and associated description.

The word "preserved" as used by Congress in tariff laws has been frequently the subject of interpretation. The uniform trend of decisions has been such as to establish a well-settled principle in the tariff interpretation, that the use of any instrumentality such as salt or sulphur fumes or any other agency of preservation in a limited extent in order to conserve the same in transit does not bring the goods into that condition known as "preserved" as that term is used in the tariff laws. Thus in *Causse Manufacturing Co. v. United States* (151 Fed. Rep., 4) the Circuit Court of Appeals for the Second Circuit makes this statement of the case:

The importations in controversy are cherries from which the pits have been removed, the fruit then washed several times in water, as a result of which the dirt and free juices were removed, then exposed to sulphur fumes, and then packed in casks in a weak solution of salt water in order to preserve the fruit in transit, the salt ranging in percentage from 0.118 to 0.402. They were designed to be converted into candied cherries, which is done by washing out the salt and sulphur dust, then boiling them in fresh water, and then boiling them in sugar sirup.

It was held by the court upon that statement of facts that the fruits were not preserved within paragraph 252 of the tariff act of 1897.

So in the cauliflower case, decided by the same court—in that case the merchandise was cauliflower, which in the language of the court



was cauliflower trimmed, washed, and packed in brine for preservation during transportation; the court saying:

This is precisely what is done in this country when it is desired to prevent cauliflower from decaying. We can not believe that this effort to keep cauliflower in "the way the farmer brings them to you" can be regarded as having a directly opposite effect, changing them from their natural state to a prepared or preserved state.

In that case the brine was sufficiently strong to act as a medium to prevent decomposition during the transit. In that case the brine used was in the main solely as a preservative agency during transit of the raw material which subsequently was to be prepared or preserved for the market upon reaching this country. In this case the use of the salt did not go that far, and even so its quantity as found was almost exactly that in the *Causse* case, which while sufficient in that case was insufficient here, else why the very expensive and constant application of the refrigeration process?

We are, therefore, of the opinion that this merchandise was not preserved as imported within proviso to paragraph 549 of the free list of the tariff act of 1897. Inasmuch, then, as paragraph 549 is the only provision in the tariff law providing for "fish eggs" *eo nomine*, and these as imported were not within the excluding exception of that paragraph, this merchandise of necessity falls within that paragraph. As the goods were assessed for duty by similitude under paragraph 258 and 261, this provision becomes applicable before the similitude clause can be invoked. Indeed, if the merchandise were directly within the terms of said paragraphs, this *eo nomine* term, being more specific than the others, is controlling.

The decision of the circuit court and the Board of General Appraisers is *reversed* and the case *remanded*.

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LAI MING *et al.* v. UNITED STATES (No. 40).<sup>1</sup>

CHINESE SHOES OR SLIPPERS, EMBROIDERED.

Chinese shoes or slippers, embroidered either by hand or machinery, are dutiable under paragraph 390, tariff act 1897, and not under paragraph 438 of said act.

United States Court of Customs Appeals, June 22, 1910.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29610).

[Affirmed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts of counsel) for appellants.  
*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

HUNT, Judge, delivered the opinion of the court:

This case presents the question whether or not the duties assessed upon certain Chinese shoes or slippers imported by appel-

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<sup>1</sup> Reported in T. D. 30770 (19 Treas. Dec., 769).

lants at the port of New York were proper. The collector imposed duty at the rate of 60 per cent ad valorem under paragraph 390 of the tariff act of 1897; but the importers contended that the shoes were only liable at the rate of 25 per cent ad valorem as prescribed by paragraph 438 of the aforementioned tariff act. The Board of Appraisers sustained the collector, and it is the determination of the board that is under review.

The shoes involved are such as Chinese people often wear. They are made of leather as the component of chief value and are embroidered with silk.

So far as material, the paragraphs of the tariff act of 1897 bearing upon the case are as follows:

339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck ruffings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéd articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of ruffings, tuckings, or ruchings; all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

390. Laces, and articles made wholly or in part of lace, edgings, insertings, galloons, chiffon or other flouncings, nets or nettings and veilings, neck ruffings, ruchings, braids, fringes, trimmings, embroideries and articles embroidered by hand or machinery, or tamboured or appliquéd, clothing ready made, and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all of the above-named articles made of silk, or of which silk is the component material of chief value, not specially provided for in this act, and silk goods ornamented with beads or spangles, of whatever material composed, sixty per centum ad valorem: *Provided*, That any wearing apparel or other articles provided for in this paragraph (except gloves) when composed in part of india-rubber, shall be subject to a duty of sixty per centum ad valorem.

438. \* \* \* Boots and shoes made of leather, twenty-five per centum ad valorem. \* \* \*

Looking at these several statutes, it is our opinion that the words "wearing apparel" as used in the proviso of paragraph 339 include shoes, and that if such shoes are embroidered by hand or machinery, as are the exhibits submitted with this record, they must be held to be dutiable as prescribed by the terms of the proviso.

The proviso under consideration is not repugnant to the purview of the section; its general purpose is to declare that the articles described within it shall be dutiable as fixed by its terms, and the effect is to extend its operation to cases not intended by Congress to be brought within the more general enactments preceding it.

Justice Field, for the Supreme Court, in *Georgia Banking Co. v. Smith* (128 U. S., 174), commenting upon the difficulties of construing the word "provided" used in a statute, said:

\* \* \* The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

In *Carter, Webster & Co. v. United States* (143 Fed. Rep., 256) the Circuit Court of Appeals for the Fourth Circuit held that the enactment of the proviso extended far beyond the body of the paragraph and became applicable to textile fabrics of whatever material composed when embroidered; and in *Jaeckel & Sons v. United States* (172 Fed. Rep., 292) the Circuit Court of Appeals for the Second Circuit declined to hold that the wearing apparel covered by the proviso must be confined to such articles of wearing apparel only as are textiles or made of textiles. The court well reasoned that if these second "or" of the proviso were "of," the most restricted application would obtain; but as the enumeration was "wearing apparel," "other article," and "textile fabric," it was evident that a broader construction is the proper one.

The scope of the provision of the section was also considered in *Lichtenstein v. United States* (154 Fed. Rep., 736), where the court held that the doctrine of *noscitur a sociis* was not correctly invoked under a contention that paragraph 390 refers only to such articles as are embraced *ejusdem generis* with laces, lace edgings, insertings, galloons, chiffons, or other flouncings and trimmings, and that a wooden folding screen carved and gilded with embroidered silk panels was properly dutiable under the terms of the proviso; and in *Kauffman v. United States* (128 Fed. Rep., 468) the court sustained a ruling that perforated pasteboard cards upon the surfaces of which are sewn mottoes in fancy letters with woolen and metal threads, and upon the face of which within the mottoes were affixed by paste or other adhesive material pictures surrounded by wreaths, were within the provisions of paragraph 339, relating to embroideries and appliquéd articles.

We cite these opinions to illustrate the views of the several courts, though we do not mean to go any further than the particular case before us warrants. As to it we hold the proviso applies.

Judgment affirmed.

Judge DE VRIES did not participate in the hearing or decision of this case.

UNITED STATES *v.* MARSCHING (No. 124). UNITED STATES *v.* DRAKENFELD (No. 125).<sup>1</sup>

TIME WITHIN WHICH APPEALS CAN BE TAKEN.

Upon the organization of this court, April 22, 1910, the provisions of the organic act as to appeals became fully effective, and sixty days, not thirty, marked the period within which an appeal could be taken from a decision of the Board of General Appraisers.

United States Court of Customs Appeals, June 22, 1910.

MOTION to dismiss appeals taken from Board of United States General Appraisers.

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn* and *John A. Kratz, jr.*, on the brief) for the motion.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

Motions are filed in these cases to dismiss the appeals taken by the Government, on the ground that they were not entered within the time prescribed by law.

The decision of the Board of General Appraisers was filed on the 31st of March, 1910. The appeals were allowed on the 24th day of May. This court was duly organized under the act of August 5, 1909, on the 22d day of April of the present year. The provisions of the organic act, section 29 of the tariff act, which are pertinent, read as follows:

After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this act \* \* \*

The Court of Customs Appeals established by this act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this act, final decisions by a Board of General Appraisers in all cases. \* \* \*

If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. \* \* \* Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them. \* \* \*

Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises. \* \* \*

<sup>1</sup> Reported in T. D. 30771 (19 Treas. Dec., 772).

## Section 41 provides:

\* \* \* All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner, except as otherwise provided in section twenty-eight of this act, as if said repeal or modifications had not been made.

\* \* \* \* \*  
 All acts of limitation, whether applicable to civil causes and proceedings or \* \* \* shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, may be commenced and prosecuted within the same time and with the same effect, except as otherwise provided in section twenty-eight of this act, as if this act had not been passed.

The appellees' contention is that these provisions, when read together, indicate the legislative purpose to continue in force the preexisting statute relative to appeals from the Board of General Appraisers so far as the same prescribed the time for appeals, and that while an appeal might be made to this court at any time after its organization, such appeal must, as to cases decided previously thereto, be taken within 30 days from the date of the rendition of the decree by the Board of General Appraisers, and the well-known rule that statutes are presumptively prospective in their operation and are not to be given retrospective operation unless the intent is made manifest by the terms of the act is invoked.

We determine these cases in full recognition of that rule. We are, however, of the opinion that the language of the act in question is clear and unmistakable, and that as to cases decided before the date of organization of the court, as well as in cases thereafter decided, the statute clearly gives the aggrieved party 60 days' time in which to appeal, wherever and whenever appeal lies to this court.

There is force in the suggestion that the only two permissible constructions of the act would be to hold that no appeal would lie to this court except in cases decided after the organization of the court, or to hold that the act applies to any case as to which the 60 days had not elapsed before the organization of the court. It is not necessary to determine in this case whether, as to cases in which the right of appeal to the circuit court would have expired had there been no organization of this court, an appeal might still be had within the 60 days, as that question is not involved.

What we do decide is that the language of the provision first above quoted, which cuts off appeals to other courts after the date of the organization of this court, provides that the appeals "allowed by law" shall be subject to review only by the United States Court of Customs Appeals, "according to the provisions of this act," in clear and unmistakable language authorizes an appeal in the manner and

within the time fixed by the act—namely, within 60 days after the entry of such decree or judgment by the Board of General Appraisers.

To give the act the construction contended for by the appellees is to read out of the provision fixing the time for appeal to this court the 60-day provision and to read into the act a provision that as to cases previously decided the court shall be governed by the practice previously existing. This would amount to judicial legislation.

Congress deemed it wise to extend the time for appeals in all cases when taken to this court to 60 days. Whether this extension was due to the fact that the court is held at a distance from the offices of the Board of General Appraisers is not known, but clearly every reason which exists for granting this time in case of appeals decided after the organization of the court applies with equal force to decisions theretofore rendered still subject to appeal and in which appeals had not been taken. It is to be kept in mind that this act as a whole speaks from August 5, 1909. It is true the appeal to this court was necessarily postponed until the organization of the court, but when that organization was effected the provisions as to appeal contained in the act became fully effective.

The motion will be *denied*.

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HABICHT v. UNITED STATES (No. 5). HABICHT v. UNITED STATES (No. 46).<sup>1</sup>

STRAWBERRY AND APRICOT PULP.

Strawberries and apricots reduced to a pulp, cooked without sugar, and inclosed in hermetically sealed tins are dutiable under paragraph 263 and not paragraph 262, tariff act of 1897.

United States Circuit Court of Appeals, June 22, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit (T. D. 30252).

[Affirmed.]

*Comstock & Washburn* (Albert H. Washburn and J. Stuart Tompkins on the brief) for appellants.

D. Frank Lloyd, Assistant Attorney General (Thomas M. Lane on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

This is an appeal to the United States Circuit Court of Appeals from a decision of the Circuit Court for the Southern District of

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<sup>1</sup> Reported in T. D. 30772 (19 Treas. Dec., 774).

New York affirming a decision of the Board of General Appraisers, which appeal, under the tariff act of August 5, 1909, has been certified to this court for determination.

Under the appeal, the question to be determined is whether strawberry pulp and apricot pulp imported into the country were properly assessed for duty at 1 cent per pound and 35 per cent ad valorem under the provisions of paragraph 263 of the tariff act of July 24, 1897, as decided by the Board of General Appraisers and the United States Circuit Court for the Southern District of New York, or whether the goods should be assessed for duty at 2 cents per pound as edible fruits, including berries, under the provisions of paragraph 262 of the same act, as contended by the importer.

Counsel for the importer insists that under the decisions of the Circuit Court of Appeals that portion of paragraph 262 which fixes a duty of 1 cent per pound and 35 per cent ad valorem on *fruits preserved in sugar, molasses, spirits, or in their own juices* applies only to goods known commercially as preserves or preserved fruits and that the pulp imported was neither a preserve nor a preserved fruit, because neither sugar, molasses, spirits, nor its own juice played a prominent or important part in its preservation.

It appears from the evidence, and the Board of General Appraisers finds, that the merchandise which is the subject of controversy is made by reducing the flesh of strawberries and apricots to a pulp. The product thus obtained is then cooked without sugar and inclosed in hermetically sealed tins, which are scalded and the contents sterilized by exposing the tins to a high temperature in an open kettle or in a retort fitted for that purpose. The evidence also shows that so long as the conditions of its packing are maintained the pulp will keep indefinitely.

From this it is clear that the goods under consideration were not preserved in sugar, molasses, or spirits. Whether they were preserved in their own juices within the intent and meaning of that portion of paragraph 263 above cited is another matter and one which can best be determined after some understanding of the methods and processes generally pursued in preserving fruits.

All the testimony agrees that fruits are preserved for future consumption by cooking the raw article in its own juices or in water and sugar or in water alone. The cooked product just as cooked or mixed with molasses, sirup, or spirits is then put up in sealed receptacles. By the heat of cooking or of subsequent sterilization the fungi which cause fermentation and the germs which make for decay in the fruit itself are destroyed or eliminated. Reintroduction of these elements of degeneration or deterioration is obviated by packing the product in hermetically sealed tins or in a saccharine or spirituous liquor which

effectually excludes the fruit from both air and moisture. If, however, the cooking is only partial the danger of destruction from factors within the fruit itself still continues, and regardless of whether it is to be put up with sugar, molasses, or spirits or in a hermetically sealed container, it must be thoroughly sterilized by exposing container and contents to a high temperature.

Fruits treated in the manner described undergo no chemical or physical change; they permanently maintain their character of fruit and are generically called "preserved fruits." Fruits preserved in sugar, pound for pound, are known to the trade by the special name of "preserves." These put up with a less quantity of sugar or in their own juices without any sugar at all are commercially described as "canned fruits." Still others put up in spirits generally receive the name of the liquor which surrounds them. It is beyond question, however, that whatever may be their *special name*, they are all subjected to practically the same processes, for precisely the same purpose, and that they are all preserved fruits.

To bring a preserved fruit within the provisions of that portion of paragraph 263 above referred to it is necessary, first, that it should have been subjected to such process as to permanently rather than fugitively and temporarily preserve it; second, that it has been so preserved in sugar or in molasses or in spirits or in its own juices; and, third, that it has not been specially provided for in the tariff act. The pulp in this fruit meets all these requirements. It is the typical *fruit preserved in its own juice*, as one of the importer's witnesses puts it, and was therefore properly assessed for duty at 1 cent per pound and 35 per cent ad valorem.

To say that the juices in which the strawberry and apricot pulp under consideration are put up play no prominent or important part in the preservation of the fruit is an assumption not justified by the evidence, which unmistakably and beyond contradiction establishes that such juices are the sterilized media which stop the chemical and physical change that would otherwise result, even if the product was inclosed in hermetically sealed containers. But if the juice played no prominent or important part in the preservation of the fruit, the fact remains that the pulp has been preserved, not fugitively, not temporarily for the purpose of transit, but permanently, just as permanently as is the fruit "preserve" or the fruit put up in molasses or spirits. The only difference between them is that the fruit in sugar, molasses, or spirits is preserved from contaminative influences by the liquid which surrounds it and the pulp preserved in its own juices is protected from such influences by hermetically sealed tins.



The cases cited by counsel for appellants do not support the contention of the importer—indeed, where they are at all pertinent they are in accord rather than at war with the conclusions here reached.

In the case of *United States v. Johnson* (152 Fed. Rep., 164) the question raised was whether pineapples in tins should be assessed as fruits preserved in sugar under paragraph 263, or as pineapples preserved in their own juices under a subsequent provision of the same paragraph. As the pineapples were preserved in their own juices, to which only 3 per cent of sugar had been added for flavoring, the court held that the added sugar played no prominent or important part in the preservation of the fruit, and therefore could not be classified as a *fruit preserved in sugar*. It did hold them dutiable, however, as pineapples "preserved in their own juices."

The case of *United States v. Reiss & Brady* (136 Fed. Rep., 741) held that "fruits preserved in sugar, spirits, and in their own juices" are known commercially as a class by themselves and come under the provisions of paragraph 263, but it did not hold that "fruits preserved in their own juices," as was the pulp in this case, did not come within that class.

*Causse v. United States* (151 Fed. Rep., 4) held that cherries from which the pits and free juices had been removed, which were then exposed to sulphur fumes and subsequently packed in casks in a weak solution of salt water *in order to preserve the fruit in transit* was not in any sense a fruit preserved in its own juices. As the juices were removed as far as possible and those which remained only tended to produce decay, and as the product was subjected to none of the processes required for permanent preservation, it will be readily understood that the circuit court of appeals found some difficulty in determining that the fruit was "preserved in its own juices."

In the case of *United States v. Reiss & Brady* (166 Fed. Rep., 746) the issue raised was whether "maraschino cherries," put up in bottles *without juice* in a light sirup flavored with maraschino, containing an insignificant quantity of alcohol, should be classified for duty as fruit preserved in sugar, spirits, or its own juice, or under paragraph 262 as an edible fruit prepared in a manner not specially provided for.

The court considered that neither the sugar nor the spirits in the maraschino materially contributed to the preservation of the fruit, and therefore refused to classify them as fruits preserved in *sugar* or *spirits*. As, admittedly, there were no juices, the cherries could not be regarded as preserved in their own juices.

The decision of the circuit court is *affirmed*.

UNITED STATES *v.* KWONG YUEN SHING (No. 8).<sup>1</sup>

## LEGUMES—YAMS.

A leguminous plant of the genus *Pueraria*, grown in China; though occasionally designated a "yam" in commerce, such designation is not definite, uniform, and general. The plant is not a yam, and was dutiable under paragraph 257, tariff act of 1897.

United States Court of Customs Appeals, June 22, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit (T. D. 30145).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

*Joseph G. Kammerlohr* (*John Giblon Duffy* on the brief) for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

This is an appeal from the judgment of the Circuit Court of the Southern District of New York, reversing the decision of the Board of General Appraisers, and is transferred to this court from the United States Circuit Court of Appeals for the Second Circuit.

The Board of General Appraisers held that the merchandise, which was invoiced as "yams" and is a vegetable, was properly assessed by the collector at 25 per cent ad valorem under paragraph 257 of the tariff act of 1897, which reads:

257. Vegetables in their natural state, not specially provided for in this act, twenty-five per centum ad valorem.

The importer claims these vegetables are entitled to free entry as "yams" as specifically exempted under paragraph 704 of the tariff act, and the circuit court upon the evidence given before the board so held.

The evidence shows that scientifically speaking the vegetable in question is not a yam, but is a leguminous plant of the genus *Pueraria*, while a yam, as scientifically described, generally belongs to the genus *Dioscoreaceae*. Some authorities, however, classify it under the genus *Convolvulaceae*. Neither of these classifications is synonymous with the genus *Pueraria*.

It also appears that by transference the term "yam" is sometimes applied to a variety of sweet potato, but this would not include the vegetable under consideration.

The importer claims that, although this vegetable it not a true yam, yet by a long and general commercial designation it is a yam within the meaning of the act, and as such entitled to be admitted free of duty.

<sup>1</sup> Reported in T. D. 30773 (19 Treas. Dec., 773).

The article being a vegetable in its natural state, it is, unless otherwise specially provided for, *prima facie* dutiable under paragraph 257, and the burden of showing that it is not dutiable is cast upon the importer. *United States v. Rosenwald* (67 Fed. Rep., 323); *Arthur v. Unkart* (96 U. S., 118); *Erhardt v. Schroeder* (155 U. S., 124); *United States v. Ranlett and Stone* (172 U. S., 133). The burden, therefore, is upon him to show that by commercial designation the term yam as used in the tariff law includes the merchandise in question.

It is pertinent, then, to inquire what is a commercial designation in a legal sense.

This is aptly defined by the Supreme Court of the United States to be "the result of established commercial usage in commerce and trade" and that the commercial usage "must be definite, uniform, and general and not partial, local, or personal." *Maddock v. Magone* (152 U. S., 368); *Berbercker v. Robertson* (152 U. S., 373).

Tested by the above rule, does the importer establish his case by the record here?

Two witnesses testified on behalf of the importer. Both had been importers of foods, including vegetables like the merchandise in question, from China for from 14 to 16 years, and had sold such importations all over the States, although the business of one was more generally confined to New York City and vicinity. One expressly said that he sold only to Chinese, and the fair inference from the testimony of the other witness is to the same effect. These vegetables were customarily described on the importer's original invoices by a Chinese character which is properly translated by the words "Fun got," which means a flower or a root out of which flour is made. Both witnesses agreed that in the transaction of sale and purchase of this vegetable amongst the Chinese it was ordinarily referred to by the said Chinese character or name, although sometimes referred to as "yam."

From the most favorable construction to be given it we think the evidence does not establish the commercial designation within the rule set forth in *Maddock v. Magone* (*supra*).

We are of the opinion that the commercial usage, so far as any is proven, is not definite, uniform, and general. It is limited, so far as it exists at all, to one class—the Chinese—and as to them it is neither uniform nor general. A consideration of the evidence on the part of the Government, which we think it unnecessary to discuss, only serves to emphasize this conclusion.

The case of *Dieckerhoff v. Robertson* (44 Fed. Rep., 160), relied upon by the importer to sustain his argument that the trade and commerce of this country is the trade which buys and sells the particular article, is not opposed to our conclusion, because, as pointed

out, the record here wholly fails to establish the proposition that the Chinese dealers themselves either uniformly or generally designate this vegetable as a "yam."

In our opinion, the circuit court was not warranted, upon the evidence, in holding that the merchandise was entitled to free entry.

The judgment of the circuit court is reversed, and the decision of the Board of General Appraisers is *affirmed*.

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KWONG YUEN SHING *v.* UNITED STATES (No. 16).<sup>1</sup>

DUCK MEAT, PREPARED—POULTRY.

The meat of ducks, salted, dried, and packed in tins, with or without peanut oil, is dutiable not as poultry dressed, nor as a nonenumerated raw or unmanufactured article, but under paragraph 275, tariff act of 1897, as meats prepared or preserved, and not specially provided for.

United States Court of Customs Appeals, June 22, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit (T. D. 30166).

[Affirmed.]

*Joseph G. Kammerlohr* (*John Giblon Duffy* on the brief) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

This is an appeal to the United States Circuit Court of Appeals from a decision of the United States Circuit Court for the Southern District of New York affirming a decision of the Board of General Appraisers, which appeal, under the tariff act of August 5, 1909, has been certified to this court for determination.

The appeal raises the question as to whether the flesh of ducks salted, dried, packed in tins, and in some instances packed in peanut oil, is assessable for duty at 25 per cent ad valorem as prepared or preserved meats under paragraph 275, as decided by the Board of General Appraisers and the United States Circuit Court for the Southern District of New York, or at 5 cents per pound as "poultry dressed" under paragraph 278, or at 10 per cent ad valorem as a nonenumerated raw or unmanufactured article, under section 6 of the tariff act of 1897, as contended by the importer.

From the evidence it appears that the ducks are killed in China; that after removing the feathers, head, feet, and entrails that part of the duck which remains is, either as a whole or in pieces, salted and

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<sup>1</sup> Reported in T. D. 30774 (19 Treas. Dec., 780).

dried in the sun. After being dried the meat is packed in tins, sometimes in peanut oil and sometimes without it. The object and purpose of salting and drying the meat, and also of packing it in oil, is to preserve it, or, as one of the importer's witnesses testifies, "to keep it in good condition for a long time."

The sample of the merchandise submitted to the Board of General Appraisers was not put up in oil, yet it was in a state of preservation, although at the time it was submitted it had been out of the tin in which it was originally packed for four or five weeks. This would seem to indicate that the salting and sun drying of the duck had effected something more than its mere temporary preservation for transit. The sample submitted during the oral argument on appeal strengthens and confirms our opinion that ducks' flesh, salted and sun dried, as was that sample, is perfectly preserved, and so prepared will keep indefinitely. Every competent witness who testified on the subject agrees that ducks dressed, drawn, salted, and dried as above described would not pass in the trade or be accepted by it in the course of business as "poultry dressed."

The merchandise clearly and unmistakably comes within the category of "meats prepared or preserved and not specially provided for," and was properly assessed for duty at 25 per cent ad valorem.

The decision of the circuit court is *affirmed*.

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### SUN KWONG ON *v.* UNITED STATES (No. 17).<sup>1</sup>

#### CUT CABBAGES, PARTIALLY DRIED AND SALTED—PREPARED VEGETABLES.

Cabbages cut, partially dried, salted, and rolled into balls or put up in hanks or bundles are dutiable as prepared or preserved vegetables under paragraph 241 of the tariff act of 1897.—*United States v. Strohmeyer & Arpe Co.* (167 Fed. Rep., 533) distinguished.

United States Court of Customs Appeals, June 22, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit (T. D. 30128).

[Affirmed.]

*Joseph G. Kammerlohr* (*John Giblon Duffy* of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*W. A. Robertson*, special attorney, on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

This cause was transferred from the United States Circuit Court of Appeals for the Second Circuit, and is an appeal from the judgment

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<sup>1</sup>Reported in T. D. 30775 (19 Treas. Dec., 781)

of the United States Circuit Court for the Southern District of New York. The circuit court affirmed the decision of the Board of General Appraisers so far as it relates to any issue before this court.

The merchandise in question is a cabbage grown in China, which, after having there been treated as hereinafter stated, is rolled into ball form or tied up in hanks or bundles and imported. This cabbage was assessed at 40 per cent ad valorem under paragraph 241 of the act of July 24, 1897, the material part of which is as follows:

241. \* \* \* All vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per centum ad valorem.

The importer claims it dutiable only under paragraph 257 of the same act, which is as follows:

257. Vegetables in their natural state, not specially provided for in this act, twenty-five per centum ad valorem.

The question here is whether this cabbage is, within the meaning of the statute, a vegetable prepared or preserved, or in its natural state.

The Board of General Appraisers and the circuit court both found upon the same evidence against the importer.

We think the evidence incorporated in this record fully warrants this finding. Therefrom it appears that before importation these cabbages are cut, dried partially at least, salted, and then rolled into balls or put up in hanks or bundles. The salt is applied for the purpose of seasoning the cabbage for cooking purposes, and also, and as we conclude, mainly for the purpose of preserving it, and the testimony of the witnesses, as well as the exhibit itself, seems to justify the conclusion that by reason of this salting the cabbage is indefinitely preserved and for a time much longer than that required for transportation.

The importer relies largely upon the authority of *United States v. Strohmeier & Arpe Co.* (167 Fed. Rep., 533) to support his contention that this cabbage should be classified as vegetables in their natural state.

With reference to that case, it is sufficient to observe that it there appeared that the merchandise, cauliflower in its natural state, would not keep more than two or three days in warm weather, and that, for the purpose of preserving it during transportation and allowing it to retain the form nature gave it, the cauliflower was immersed in a weak brine which was not capable of preventing decay for any appreciable length of time. Such is not the case at bar.

The judgment of the circuit court is *affirmed*.

UNITED STATES v. RIEBE (No. 35).<sup>1</sup>

## 1. QUESTIONS OF FACT.

The Court of Customs Appeals has power to review questions of fact.

## 2. ULTRAMARINE BLUE.

Where there were two importations of material resembling ultramarine blue, and assessed as ultramarine blue by the collector of customs, under paragraph 52, tariff act of 1897, the Board of General Appraisers, after testimony taken, finding one item properly assessed and the other improperly assessed, because this rightfully fell under paragraph 58 of said act, the facts being reviewed, the board is affirmed.

United States Court of Customs Appeals, June 22, 1910.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 21396 (T. D. 29834).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*James L. Gerry* and *Allan R. Brown* for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers. The merchandise in question consisted of two importations, each of which was classified by the collector of customs as ultramarine blue and a duty assessed thereon under paragraph 52 of the act of 1897 at the rate of 3½ cents per pound.

The importers claimed that neither of the importations was according to the commercial standard ultramarine blue, but should have been assessed at 30 per cent under paragraph 58 of the act as a paint, color, or pigment not otherwise provided for.

The case was heard before the Board of General Appraisers upon testimony, and an opinion filed in which it was found that as to one item, known in the record as item 3007, the collector's classification was correct; but that as to the item known as 3006 the article was not what was known commercially as ultramarine blue and dutiable as such, and sustained the contention of the importer.

It is obvious that the finding of facts of the Board of General Appraisers fully sustains the result reached, and the first question presented is whether we are at liberty to review this finding of facts.

It is broadly contended by the appellee that where there is evidence to sustain the findings of the board, such findings are conclusive, even though the testimony may be conflicting, and though the court may be of the opinion that if it had the case before it *de novo* it might decide the other way. As this is the first case in which this question has been

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<sup>1</sup> Reported in T. D. 30776 (19 Treas. Dec., 783).

discussed by this court, it is proper to refer to the statute upon the subject. Subsection 29 of section 28 of the act of August 5, 1909, provides:

\* \* \* If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: \* \* \* Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. \* \* \*

Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

A careful reading of this statute satisfies us that it was the intent of Congress that this court should have the power to review questions of fact. The circumstance that all the evidence before the board is competent evidence and that all is required to be returned to this court indicates that such was the intent.

We think the proper practice is analogous to that which obtains on appeals in equity cases in the State or Federal courts. That rule has been stated in various ways in the different courts, but the courts all recognize the better opportunities of a trial court to judge of the credibility of witnesses, and hesitate for this reason to disturb the conclusion except in a case where the evidence is clearly inconsistent with the conclusion reached by the trial court. The rule as stated in the *Blankensteyn* case (56 Fed. Rep., 474) is as follows:

The circuit court should not undertake to disturb the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board. But when the finding of fact is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence, it is the duty of the circuit court to disregard it.

We think this a fair and correct statement of the rule which should govern us under the organic statute above quoted.

This leads us to the inquiry as to whether the conclusion of the board in this case is clearly against the weight of evidence. We have not been able to satisfy ourselves that the Government has presented such a case. An importation somewhat similar, described as "gray



blue," was under consideration in G. A. 6636 (T. D. 28294). In that case the importation consisted of a pigment containing ultramarine blue, but of pale-blue tint and not possessing the strength of ordinary commercial ultramarine blue. It was held not to be the ultramarine blue of commerce, and not dutiable as such, but dutiable as a pigment under paragraph 58, as held in the present case.

It is sought by the Government to distinguish this case. Among the witnesses called to sustain the claim that this article was ultramarine blue was a chemist who was likewise a witness in the former case and who in that case declared that to be ultramarine blue. A number of dealers in ultramarine blue were called who expressed in a way the belief that this was ultramarine blue. But it is noticeable that they were not able to give a dividing line between what would be considered commercial ultramarine blue and what would not. One witness was asked:

Q. Suppose it contained 20 per cent of ultramarine and 80 per cent gypsum, would it be a commercial delivery for ultramarine?—A. Frankly, I don't know, sir, until I saw the test made.

Q. Is there any line that you are willing to draw here as representing the place where an article containing ultramarine and gypsum?—A. Only?

Q. Well, with the other slight percentages testified to in this case; you heard the analysis; is there any line you are willing to state where a thing ceases to be, commercially, ultramarine by reason of the smallness of the ultramarine, or where it begins to be ultramarine by reason of the quantity of ultramarine contained therein?—A. No, sir; I couldn't say that.

Q. Now, taking an article containing 20 per cent of ultramarine and gypsum and practically the proportions of the other materials as here testified to, what would determine whether that was an ultramarine or not in commerce, if the percentage of ultramarine were not the determining factor?—A. The use to which it would be put.

Q. Oh, then it's the use that determines whether an article be ultramarine or not?—A. I don't know as I could answer that until I saw the tests out here. It's impossible for me to answer yes or no.

This witness also testified that he had not in recent years found any ultramarine blue which contained aniline colors. It is undisputed in the present case that this article did contain a small percentage of aniline.

From the cross-examination of this witness, we are satisfied that the article in question would not have been accepted by the trade as a good delivery of ultramarine blue under contract. The facts, as we gather from the record, are that this importation contained a percentage of ultramarine blue, as one chemist testified, of about 26 per cent; that it also contained aniline dye. It is probable that the percentage is somewhat larger in this importation than in that considered in the case above referred to. But it is also apparent that the color was supplemented by the small percentage of aniline dye contained.

The report of the analysis made by Mr. Berry, a witness called for the Government, was as follows:

Ignited.....	Light-blue gray.
Alcohol.....	Dissolves a blue coal-tar color.
Hydrochloric acid.....	Decomposed, odor of H <sub>2</sub> S. Solution blue.
Composition .....	Chiefly carbonate and sulphate of lime with a small amount of ultramarine; colored with blue dye.

The importer in this case, who seems to have been the only one who testified who actually made use of this article in his trade, testified that this article imported is not ultramarine blue; that it was not sold as such, but was purchased and sold under a different name. His testimony is that the price of ultramarine blue abroad varies from 5 cents to 20 cents a pound, and that the price of the article here under consideration is between 2½ and 3 cents a pound; that this was used as a substitute for ultramarine blue, and was imported to sell to the paper and paint trade as a substitute for ultramarine blue.

As before stated, the Board of General Appraisers, with all the witnesses before them, and with a better opportunity to judge their testimony than is afforded us, found the facts as contended for by the importer. The testimony amply supports that finding, and we do not feel justified in disturbing it.

The decision of the Board of General Appraisers is *affirmed*.

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#### UNITED STATES v. PROSSER (No. 24).<sup>1</sup>

##### PIECES OF CAST STEEL.

Pieces of cast steel upon which machine work had been done after being cast and so forming a combination of parts ready for immediate use in a cement mill are finished articles and are not "plates" as provided for under paragraph 135, tariff act of 1897, and were dutiable under paragraph 193 of that act.

United States Court of Customs Appeals, July 25, 1910.

APPEAL from a decision of the United States Board of General Appraisers, G. A. 6193 (T. D. 26835), T. D. 27493.

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*John A. Kemp* on the brief), for the United States.

*Brown & Gerry*, for the appellees.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

HUNT, Judge, delivered the opinion of the court.

Prosser & Son imported into New York 84 cast-steel grinding parts, weighing about 1,000 pounds each, to be used in certain kinds of mills for grinding in the manufacture of cement. Duty was assessed

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<sup>1</sup> Reported in T. D. 30848 (19 Treas. Dec., 872).

by the collector at 45 per cent ad valorem under the provisions of paragraph 193 of the tariff act of July 24, 1897, which reads as follows:

Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per cent ad valorem.

The importer contended that the proper duty is as prescribed by paragraph 135 of the aforementioned act, which reads as follows:

135. Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partly manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act \* \* \*.

The Board of Appraisers sustained the importer's contention, and from the decision of the board, the United States prosecutes this appeal.

The argument of the learned Assistant Attorney General is that the Board of Appraisers erred in holding the materials in question to be dutiable as shapes, castings, plates, or steel in forms and shapes under paragraph 135, inasmuch as the term plate does not correctly describe the merchandise. It is said that while paragraph 135 as quoted provides for plates, yet it makes no provision for ball mill plates, or ball mill grinding plates, or plates which have been manufactured into definite forms and shapes, and made into pieces ready for special and definite use as parts of a ball mill; and in a more general way it is insisted that, when steel has been so far advanced in its manufacture that its use can only be for a definite purpose, and the piece as made can only be fitted to a particular machine, and in a particular part of such machine, then it has become an article of steel manufacture, and is to be held dutiable under paragraph 193 quoted.

Without stating the evidence at length, it appears therefrom that the materials involved are made of steel casting and are parts of a particular kind of ball mill for cement grinding. The several witnesses spoke of them as being called "plates," "lining plates," "ball mill plates," and "liners," the word plates being used apparently to give a more general designation of their character. Each of the "plates" is bolted to a side wall of the mill, 12 of them comprising the periphery of the mill. A set of balls is put into the mill as essential to completion and operation in grinding. Material is fed in by automatic feeder among the balls and the mill revolving throws the balls and pulverizes the rock or material between them. The importers do not assemble the pieces in this country, but after impor-

tation keep them in stock and ship them to wheresoever purchasers may desire. The mill plates are of uniform size and ready to go into the mills; Each piece or plate is made by putting the pattern in sand, and casting the steel into the mold made by the pattern. Then holes are drilled by machine and the edges are made true to fit. The process of manufacture is not by roller, but casting. The plates fit between two heads. The heads are keyed onto a main shaft and the base on which the plates fit to the heads is turned, so that when the heads are placed on the shaft the distance between the two heads is identically the same all around. As described, each plate is turned or ground on the end and on the edges of the flanges, so as to fit in a groove on a tread, and the plates must be made of the same length and perfectly true in order to fit. They must be bolted together to make a solid machine, the flanges being put on to make the bolting possible. The holes in the pieces are drilled perfectly true, the holes made equidistant from the center and so placed that when one piece or plate is worn out it can be taken out and another put in without any labor other than that of putting it in its place.

From these descriptions, it seems quite clear to us that the mill into which these pieces go is a combination of parts, the particular parts under consideration being irregular in shape, with machine work done after casting and before importation, each piece ready in the condition as imported for immediate use for the object for which it was intended.

The evidence of uniform and general commercial designation is not at all satisfactory. It does not justify a conclusion that the word plates commonly or sufficiently describes the articles in question. *Hedden v. Richard* (149 U. S., 346); *United States v. Dudley* (174 U. S., 670).

An order for the articles as plates would not be understood, ordinarily, unless special description was given to the seller. Ball mill plates, grinding plates would probably be enough of a qualification, but merely plates would not be, for the reason that plates are commonly understood to be steel plates that have not been made into another complete article of commerce. In *United States v. Newman Wire Company* (152 Fed. Rep., 488) Judge Hazel, distinguishing if not doubting a former ruling made by himself in *Morris v. United States* (140 Fed. Rep., 774) distinctly so held. See also *United States v. Meier* (136 Fed. Rep., 764). The court of appeals, in affirming *Newman v. United States* (159 Fed. Rep., 123), declined to hold that what was called a "draw plate" or "wortle" was within the provisions of the term plate, as meant by paragraph 135. It must be correct to say that although an article may be called a plate yet it can not be described as one unless it is plate.

It may be admitted that cases do arise in the construction of tariff laws where evidence of commercial designation and usage is so clear

as to compel a ruling that seems more in harmony with commercial or trade sense than with words as used in an ordinary way, but the evidence in the record before us does not warrant the application of such an interpretation.

Our judgment is that the articles involved are finished articles, not plates, as meant by the words "sheets and plates and steel in all steel castings," which refer to commodities at a lower stage of manufacture.

The judgment is *reversed*, with directions to proceed in conformity with this opinion.

DE VRIES, Judge, being disqualified, did not participate in the hearing or decision of the case.

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UNITED STATES v. JACKSON (No. 6). UNITED STATES v. PISANI (No. 47). UNITED STATES v. TRAITEL MARBLE CO. (No. 48). UNITED STATES v. BOCKMANN (No. 49). UNITED STATES v. ROSSMAN (No. 50).<sup>1</sup>

HAUTEVILLE, ISTRIAN AND THE LIKE STONES, MARBLE.

1. Where there is a later importation of merchandise identical in kind with a former importation and a new and different issue is presented as to the true character of the importation, this court will, in reaching a decision, review all the testimony (declining to follow *Bockmann v. United States*, 158 Fed. Rep., 807; T. D. 28784).

2. Hauteville, Istrian, and other like stones being a granular substance, capable of a high degree of polish and susceptible of use for decorative purposes, are not limestones, but marble, and were dutiable under paragraph 114, tariff act of 1897 and not under paragraph 117 of that act.

United States Court of Customs Appeals, July 25, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit, G. A. 6856 (T. D. 29496).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

*Walden & Webster, Curie, Smith & Maxwell, Comstock & Washburn, and Hatch & Clute* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

It appears from the record in this case that there was imported into the country at the port of New York by various importers a certain class of stone known by the several names of "Istrian," "Cava Porto," "Cava Bandiera," "Hauteville," "Cava Romana," "Basseville," "Pierre Calciere," and "Echaillon." It is practically agreed and the overwhelming weight of testimony is to the effect that the

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<sup>1</sup> Reported in T. D. 30849 (19 Treas. Dec., 874).

stones designated by these different names are chemically and structurally the same and that with the exception of some variation in color there is no marked distinction between them.

The importations were assessed by the collector as marble in block at 65 cents per cubic foot under the provisions of paragraph 114 of the tariff act of 1897. The importers protested that the merchandise should have been assessed at 12 cents per cubic foot as limestone or other building or monumental stone under the provisions of paragraph 117 of the same act.

As there was no material difference between the stones either as to texture, susceptibility to polish, or in the uses to which they might be applied, and inasmuch as the United States Circuit Court of Appeals had already decided in the case of *Bockmann v. United States* (158 Fed. Rep., 807) that Hauteville stone was not a limestone with a crystalline granular structure and therefore not assessable for duty as marble, the Board of General Appraisers, without making any express finding of fact as to whether the stones were or were not crystalline granular limestone, held the judgment in that case to be controlling and sustained the protest.

From this decision an appeal was taken by the Government to the United States Circuit Court for the Southern District of New York, which, after restating its original opinion that the Hauteville stone was a limestone "altogether too susceptible to a high polish and too advantageous in use as an interior decorative stone, too granular and too crystalline not to be segregated and separated from such stones as freestone, granite, sandstone, etc.," held that the appellant had evidently failed to convince the board that the importations were of that character and, applying the law laid down by the circuit court of appeals, affirmed the board's decision.

From the judgment of affirmance the Government took an appeal to the United States Circuit Court of Appeals, which appeal having been certified to this court under the provisions of the tariff act of August 5, 1909, is now submitted for determination.

Only one real issue—one of fact—is raised by the appeal: Are the imported stones marble—that is, limestone with a crystalline granular structure, as claimed by the Government, or are they just limestone, building or monumental stones in the commercial or in the ordinary meaning of those terms, as contended by the importers?

Counsel for the appellees insist that this issue has been already definitely decided by the circuit court of appeals and that its decision holding such stones to be limestone and not marble should not be disturbed, especially as the Board of General Appraisers has found the facts of the present case against the Government.

The *Bockmann* case was tried before the Board of General Appraisers on the assumption that Hauteville and similar stones *were known to*

*the trade as marble*, and six witnesses were produced by the Government to sustain its contention in that behalf. *No testimony whatever was offered showing or tending to show that the importation was actually marble—that is to say, crystalline limestone with a granular structure.*

The importers introduced seven witnesses engaged in the marble business, who testified that the stones were commercially known as stone *and not as marble*, and that a limestone to be recognized in the trade as a marble must be a crystalline limestone, susceptible of a high **polish, with veinings, markings, and colorings fitting it for decorative purposes.** These witnesses further declared that the Hauteville stone, which was the stone under consideration in the Bockmann case, was a “monotone,” wholly without distinctive markings or colorings, and that while *sometimes* used for ornamental work and *sometimes* called a marble, it was not *generally* regarded by the trade as a marble.

On the issue of fact thus made up the circuit court of appeals very properly held that a trade designation had not been made out, and decided that as the Government had not shown that the Hauteville stone was actually a marble—that is, a crystalline limestone with a granular structure—or that it was anything more than a high-grade limestone, ornamental and polishable, the importation could not be removed from the limestone paragraph and classified as marble.

We are of the opinion that while this decision closed the door on further discussion in the Bockmann case it did not finally conclude either party as to a subsequent importation of the same material or preclude either of them from endeavoring in a later case to sustain by further and better evidence the very issues which had previously failed for lack of probative facts or want of sufficient proof. Much less did it bar the Government or importers from tendering a new issue or from trying the matter on a theory not contemplated in the original controversy.

Although it was the clear intent of Congress that this court should have power to review the facts, we find no fault with the general proposition that the determination of the Board of General Appraisers as to doubtful questions of fact involving the intelligence or credibility of witnesses should be respected and that no finding of fact by the board unless clearly contrary to the weight of evidence or wholly without evidence to support it should be disturbed. *In re Van Blankensteyn* (56 Fed. Rep., 474); *United States v. Edgar C. Riebe* (T. D. 30766, *supra*, p. 19).

As, however, the Board of General Appraisers evidently considered that *Bockmann v. United States* (*supra*) was decisive of the issues here involved and therefore made no findings of fact, it would seem that this court, which does not accept the Bockmann case as conclusive on the facts, must of necessity review the evidence sub-

mitted to the board if it is to reach any settled opinion as to the true nature and character of the importation.

Such a review, which includes an examination of the testimony given in the Bockmann case, a part of the record, discloses that 13 witnesses testified on behalf of the Government as to the nature, character, and uses of the merchandise under discussion. Some of these witnesses were managers and some superintendents of marble quarrying concerns, some were importers of marbles, some were wholesale or retail dealers in foreign and domestic marbles, others were sawyers, cutters, polishers, or finishers of marble. None of them had less than 18 years and most of them more than 25 years of experience in the business of dealing with marble or preparing it for use. Ten of these witnesses testified that the stones in controversy were limestone with a crystalline granular structure, and all of them, without exception, declared that they were actually marbles; that they were known to the trade as such; that they were susceptible of a high polish, and that they were not only suited for decorative and ornamental work, but that they were actually imported into and used in this country for that exclusive purpose.

As against the case presented by the Government the importers produced eight witnesses having a long but probably a somewhat less varied experience with marble than those who gave evidence for the appellant. Of these eight witnesses only three gave any direct or positive opinion as to the chemical or structural composition of the merchandise which was the subject of protest. Robert Rossman and C. D. Jackson, appellees, testified that stones of the Hauteville and Basseville type were not crystalline limestone at all; Edmund Otis Hovey, a geologist, declared that they were not crystalline but subcrystalline limestone, and not granular, because such crystals as they contained were cemented together by some material other than that of which the crystals were composed. Rossman and Hovey both admitted, however, that some of the exhibits submitted did contain crystals, and Benjamin D. Traitel testified that the stone had a crystalline texture. A. E. Bockmann said that Cava Romana is crystallized.

Two of the witnesses, William K. Fertig and Abraham E. Bockmann, an importer, declared that the stones were not susceptible of a high polish. J. A. Pisani, Robert Rossman, Lincoln Peirce, and Benjamin D. Traitel, all importers, and Arthur Schilbach, a witness in their behalf, testified that the stones *were* susceptible of a high polish and would take as high a polish as marble. Pisani, Rossman, Fertig, and Schilbach admitted that the stones are used in this country for decorative purposes. Seven of the witnesses for the importers testified that in the trade the stones were not recognized as marble and



that commercially marble is distinguished from ordinary limestone by veinings, markings, or colors which make it available for decorative or ornamental purposes. C. D. Jackson, importer and appellee, declared in the Bockmann case that these stones *were* known to the trade as marble and were used in this country for the same purposes as marble.

From all this it would seem to be clearly established by a preponderance of credible evidence:

First. That all these stones are limestone with a crystalline granular structure;

Second. That they are susceptible of a high polish; and

Third. That they are not only decorative and ornamental in effect, but that they are imported into and used in this country for that purpose and none other.

As 14 credible witnesses out of 21 testified that the imported merchandise is known to the trade as marble, we do not feel justified in finding that it is definitely, uniformly, generally, or even usually known as stone, limestone, building stone, or monumental stone. Considering all the evidence and accepting the most restricted definition of marble fixed by the standard authorities and by the testimony for the Government and the importers, to wit, that marble is a crystalline limestone or crystallized carbonate of lime susceptible of a high polish and decorative or ornamental in effect, it is evident that the importation is one of marble and should be so classified.

Judgment reversed.

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PROSSER v. UNITED STATES (No. 25).<sup>1</sup>

CAST-IRON DISKS.

Cast-iron disks, when subjected to processes of manufacture and made thinner on one edge than the other and with an irregular surface, are not "plates" within the meaning of paragraph 148, tariff act of 1897, and were dutiable under paragraph 193 of that act.

United States Court of Customs Appeals, July 25, 1910.

TRANSFERRED from the United States Circuit Court, Southern District of New York,  
G. A. 6629 (T. D. 28276).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

Thos. Prosser & Son imported into the country at the port of New York certain ring-shaped metal grinders, invoiced as cast-iron grind-

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<sup>1</sup> Reported in T. D. 30850 (19 Treas. Dec., 878).

ing disks and designed to form part of a machine for grinding corn, licorice root, and similar substances. These grinding disks are thinner at the inner than at the outer edge and from the beveled surface thus presented project a large number of teeth of graduated sizes, placed in rows, with the coarser teeth near the center and the finer near the rim of the disk. The teeth are cast with the so-called disk and on one or both sides of it, as its position in the machine for which it is intended may require. After the casting is made the teeth are machine sharpened and screw holes are drilled, or at all events countersunk, in the disk to fasten it in place. As imported the grinding disks are fully finished and without further preparation or processes of manufacture are ready to be fitted to the machine for which they are made. They are mounted on a revolving shaft in pairs, and the teeth of one, engaging those of the other, crush the corn, licorice root, or other similar substance fed from a hopper into the spaces between the teeth.

The collector assessed the merchandise at 45 per cent ad valorem under paragraph 193 of the tariff act of July 24, 1897, which fixes that rate of duty on—

Articles or wares not specially provided for \* \* \* composed wholly or in part of iron, steel \* \* \* or other metal and whether partly or wholly manufactured.

The importer protested that the importation was properly dutiable at eight-tenths of a cent per pound under paragraph 148, which fixes that rate on "Cast-iron vessels, *plates*, stove plates, andirons, sad-irons, tailors' irons, hatters' irons, and *castings of iron* not specially provided for." The Board of General Appraisers sustained the collector, and from its decision an appeal was taken to the United States Circuit Court for the Southern District of New York, which appeal in accordance with the provisions of the tariff act of August 5, 1909, has been certified to this court for determination.

In their brief on appeal counsel for appellant seem to argue that the importation in question had a *commercial* designation and that the disks were *commercially* known as "*plates*." The case was not tried before the board on that hypothesis, however, and as no evidence appears of record showing or tending to show a commercial designation the court's consideration will be limited to the claim set up in the specifications of error, that the wares are either plates or castings of iron within the ordinary meaning of the words.

The disks are certainly castings of iron in the sense that they are cast iron, but as they have been advanced from that condition by processes of manufacture they have lost their character of castings, and unless they are plates within the meaning of paragraph 148 they have become manufactures of iron dutiable under paragraph 193.

Are they plates? That is the question. Counsel argues that a plate as ordinarily understood is a piece of metal *approximately* flat and even surfaced; that a disk as ordinarily understood is any flat, circular plate—any plane or surface that is flat and circular or approximately so; that the goods under consideration are universally known as disks; that consequently they are disks, and therefore they are plates. Unfortunately, for this argument, the evidence establishes nothing more than that the invoice describes the importation as “cast-iron grinding disks” and is very wide of showing that the wares are universally or even generally, commonly, or ordinarily known as disks. We can not hold that an invoice name finally fixes the status, nature, or character of an importation. To do so would enable the importer to fix his own rate of duty or none at all, as best pleased him.

The difficulties in the way of bringing this merchandise within the ordinary everyday meaning of the word “disk” are just as great as are those encountered in making the goods recognizable as plates within the ordinary everyday meaning of the word “plate.” A disk is nothing more and nothing less than a plate, circular or approximately circular in form, and as defined by dictionaries of high authority a plate is (a) a sheet of metal of uniform thickness and even surface (Century); (b) a piece of metal extended or flattened to an even surface with a uniform thickness (Imperial); (c) a flat, comparatively thin, usually rigid sheet, slice, leaf, or lamina of metal or other substance, of more or less uniform thickness and even surface (New English Dictionary—Murray); (d) a flat, or nearly flat, piece of metal, the thickness of which is small as compared with the other dimensions. (Webster.)

According to these definitions, uniformity of thickness and evenness of surface are the characteristics of a plate. A plate is a *flat* piece of metal; that is to say, “a piece of metal with an even or horizontal surface, or nearly so, without marked prominences or depressions” (Webster). If this be the correct description of a plate, if the word “plate” is properly defined by the standard dictionaries, it can scarcely be contended with convincing force that a piece of metal which is thinner at the inner than at the outer edge and therefore not of uniform thickness, *which is covered with teeth or prominences* cast with it on one or both sides and therefore not flat or even of surface, is a plate, or even a disk, which is a circular plate.

In our opinion the grinding disks described in the testimony have no claim whatever to the designation of plate and but one to that of disk, namely, their circular form.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* SIEGLE (No. 3).<sup>1</sup>

## LAKES CONTAINING LEAD.

Lakes containing lead were dutiable under paragraph 54, tariff act of 1897, and not under paragraph 58 of said act.

United States Court of Customs Appeals, October 18, 1910.

APPEAL from United States Circuit Court, Southern District of New York, to the United States Circuit Court of Appeals and transferred to this court, Abstract 18995 (T. D. 29031).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn* of counsel) for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court.

This is an appeal from the decision and judgment of the United States Circuit Court for the Southern District of New York affirming the decision of the Board of General Appraisers.

The merchandise in question consists of bronze lakes and scarlet lakes which the collector of customs assessed for duty at 30 per cent ad valorem under paragraph 58 of the act of 1897. The board of appraisers held that the goods were properly dutiable at 5 cents per pound under the provisions of paragraph 54 of said act, and the circuit court affirmed the decision of the board. From this ruling the Government appeals.

The facts in the case are not disputed. It is admitted that the merchandise consists of lakes, in the manufacture of which some form of lead is used. A lake is defined as "a pigment formed by combining some coloring matters, usually a precipitation, with a metallic oxide or earth." The term "colors," as understood in the trade, is, according to the testimony, broad enough to embrace lakes, but the term "lakes" would not embrace all colors.

Paragraph 54 reads as follows:

Vermilion red, and other colors containing quicksilver, dry or ground in oil or water, ten cents per pound; when not containing quicksilver but made of lead or containing lead, five cents per pound.

There can be no doubt that this language aptly describes the importation. The article imported consists of colors containing lead, and clearly comes within paragraph 54 unless the subsequent provision takes "lakes" out of the class. This is contended.

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<sup>1</sup> Reported in T. D. 31005 (19 Treas. Dec., 1054).

Paragraph 58 reads as follows: ,

All paints, colors, pigments, lakes, crayons, smalts and frostings, whether crude or dry or mixed, or ground with water or oil or with solutions other than oil, not otherwise specially provided for in this act, thirty per centum ad valorem; all paints, colors and pigments commonly known as artists' paints or colors, whether in tubes, pans, cakes or other forms, thirty per centum ad valorem.

It is contended that the term "lakes" is more specific than the term "color containing lead." All colors are paints, pigments, lakes, crayons, smalts, or frostings, and if lakes be deemed a specific designation, which excludes the operation of paragraph 54 when the importation consists of lakes, it would seem clear that when the article is more properly designated as "paints, pigments, crayons, smalts, or frostings" it would be excluded also, and no room for the operation of paragraph 54 would be left. The more reasonable construction is that paragraph 58 was designed as a catch-all provision, intended to apply to articles not enumerated, if any such there should be. In this view the two paragraphs can stand together. It must be held that "colors containing lead" is quite as specific as "lakes," and that in view of the fact that paragraph 58 is qualified by the phrase "not otherwise expressly provided for," it can not be given effect to defeat the plainly expressed intention of paragraph 54 to fix the duty on colors containing lead at 5 cents per pound.

The case of *Keppelmann v. United States* (116 Fed. Rep., 777), cited by appellee, although instructive, may be distinguished, and is not relied upon as fully sustaining our conclusions. In the case of the *United States v. Bird* (167 Fed. Rep., 319; T. D. 27633) the Government contended that "zinc white paint" or "enamel white paint" was dutiable under paragraph 58. The court, however, held the importation dutiable under paragraph 57, which reads:

Zinc, oxide of, and white paint or pigment containing zinc, but not containing lead, dry, one cent per pound; ground in oil, one and three-fourths cents per pound; sulfid of zinc white, or white sulphide of zinc, one and one-fourth cents per pound; chloride of zinc and sulphate of zinc, one cent per pound.

This was held, notwithstanding the fact that other ingredients were added to increase the gloss, as in the view of the court the materials thus added did not change the character of the article imported. If we consider the terms of paragraph 54 "colors made of lead or containing lead" as specific, the case cited is analagous. We do so construe paragraph 54.

It follows that the decision of the Board of General Appraisers and that of the Circuit Court for the Southern District of New York should be *affirmed*.

PARK & TILFORD *v.* UNITED STATES (No. 21).<sup>1</sup>

## BOTTLES OF BLOWN OR MOLDED GLASS WITH CUT-GLASS STOPPERS—ENTIRETIES.

Bottles, made of glass, plain, blown, or molded, designed to be subsequently fitted with cut-glass stoppers, are not dutiable as articles apart from the glass stoppers imported with them; the bottles and the cut-glass stoppers were dutiable as entireties as cut-glass bottles under paragraph 100, tariff act of 1897.

United States Court of Customs Appeals, October 18, 1910.

TRANSFERRED from the United States Circuit Court, Southern District of New York,  
G. A. 6794 (T. D. 29192).

[Affirmed.]

*B. A. Levett* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

This is an appeal by the importer from the United States Circuit Court for the Southern District of New York affirming the judgment of the Board of General Appraisers.

The merchandise in question is glass bottles, the bodies of which are plain, blown, or molded glass, not cut or ground in any manner, except such grinding as is necessary for fitting the stoppers, which are of cut glass and of a value greater than the bodies of the bottles.

The bottles were filled with alcoholic perfumery and including the stoppers were all purchased in France from the same dealer and invoiced and imported together. They were generally packed in cartons or fancy boxes, each containing one or more bottles.

The perfumery is dutiable separately and no question arises concerning the same.

Although it is not entirely clear, the invoices may be construed to undertake to place separate values upon the bottles and the stoppers.

The appellants claim, the board found, and we assume that the bodies of the bottles and the stoppers before being fitted each to the other, as hereinafter described, were made in different countries.

As we understand the record and claims of counsel, the body of each bottle before being imported was ground to fit and receive a particular stopper and was fitted with it; that thereafter the two were kept together; that the bottle after being filled was closed with the stopper; that generally a fancy cap was put on, presumably coming down to the neck of the bottle, and in that condition the bottle and its contents were imported and were designed to be sold as an entirety.

One purpose in fitting and using these cut-glass stoppers is to prevent a leakage of the perfumery, and when the contents are volatile a perfect fit of the stopper in the neck of the bottle is necessary.

It appears from the record that in the manufacture of such bottles with cut-glass stoppers each bottle as first blown or molded has a thicker neck than one designed to be stoppered with cork; that this is for the sole purpose of permitting it to be ground to fit the stopper, and until the bottle is so ground a glass stopper will not fit it. After

<sup>1</sup> Reported in T. D. 31006 (19 Treas. Dec., 1056).

being ground a particular stopper would only fit one bottle, and if the bottle were destroyed the stopper would be of no use unless another bottle were ground to fit it.

The collector assessed the bottles and the stoppers as cut-glass bottles under paragraph 100 of the tariff act of July 24, 1897: The appellants insist that the stoppers only should be so assessed under that paragraph and that the bodies of the bottles, the bottles as they are referred to in the record, should be assessed as plain, blown, or molded glass bottles under paragraph 99 of the same act.

The question, therefore, as we view it, is really one of entirety. Does the fitting of the two parts of the bottle as stated constitute them one article, thereby making the result a cut-glass bottle as claimed by the Government, or should the body of the bottle and the stopper be treated as separate articles, the former as plain glass and the latter as cut glass, for tariff purposes?

The record discloses that sometimes the bodies of the bottles and the stoppers before being fitted to each other by grinding are treated as separate articles of commerce. Whether under such circumstances they may be so treated for tariff purposes is not before us, but when assembled and fitted each to the other as in this case, we think it is more consonant with common sense and reason to hold that the two parts become one whole, and, the stopper being cut glass and the component of chief value, that the bottle is cut glass within the meaning of paragraph 100. Both are of the same material, and to hold that, after they have been assembled as appears in this case, they are nevertheless separable, would be much like declaring that a wooden rake tooth, after it was inserted in the ordinary wooden hand rake, was not a part of the rake.

A somewhat analogous question was before the Supreme Court in *United States v. Schoverling* (146 U. S., 76).

There it appeared that an importation of 12 finished gunstocks with locks and mountings was made by one importer, with the understanding that another importer was to import a like number of finished gun barrels designed to be inserted in these gunstocks, with the mutual expectation that these stocks and barrels were to be put together after arriving in this country, and it was claimed by the Government that these gunstocks should, under the circumstances, be assessed for duty as guns.

The court refused to sustain this contention and in substance held that the gunstocks should be assessed under a paragraph of the tariff which did not relate to guns.

In *Isaacs v. Jonas* (148 U. S., 648) the Supreme Court held that the importation, consisting of cigarette papers in packages of separate pieces, designed and suitable for cigarette wrappers, and of a proper size, together with pasteboard covers of corresponding size designed to be used with the paper to make cigarette books, was an entirety as a smoker's article, and in referring to the *Schoverling* case said, in substance, that no intimation was made therein that if the stocks and barrels had both been imported by the same person at the same

time, with the intention of putting them together as guns, they would not have been dutiable as such.

The following cases, which we think unnecessary to discuss, may be referred to as sustaining the conclusion which we reach: *United States v. Leigh* (159 Fed. Rep., 314, T. D. 27760); *United States v. Auto Import Co.* (168 Fed. Rep., 242, T. D. 28044); *United States v. Mathews* (78 Fed. Rep., 345); *Wanamaker v. Cooper* (69 Fed. Rep., 465).

The appellants further contend that the articles are not cut bottles under the trade understanding at the time the law was enacted.

It may be doubted if this is a case that from any standpoint permits or requires the application of the doctrine of a trade or commercial designation.

Assuming, however, that the case involves this question, we do not think, when the testimony of the witnesses, upon parts of which the appellant's counsel relies to support the contention, is considered as a whole, it shows that at and prior to July 24, 1897, or at any other time, there was or has been any definite, uniform, and general trade designation of cut-glass bottles which excludes such as are before us and warrants or requires us to hold that bottles made and used as appears in this case are not cut-glass bottles within the meaning of said paragraph 100.

The judgment of the circuit court and of the Board of General Appraisers is *affirmed*.

### STEIN v. UNITED STATES (No. 31).<sup>1</sup>

#### 1. COMMISSIONS PAID A COMMISSIONAIRE.

A commission paid a commissionaire for receiving goods, comparing with samples, procuring cases, packing and shipping these goods, is a commission simply and as such is nondutiable.

#### 2. DURESS.

An item amongst others in an importer's invoice showing a commission had been paid a commissionaire is held to have been placed in the invoice under duress, it appearing that under the Customs Regulations the omission of this item by the importer would be followed by its immediate inclusion and further by the exaction of a penalty for its omission.

#### 3. APPRAISEMENT.

It is not within the province or jurisdiction of this court to make a finding of the market value of imported goods.

United States Court of Customs Appeals, October 18, 1910.

TRANSFERRED from United States Circuit Court, Southern District of New York,  
G. A. 6742 (T. D. 28886).

[Reversed.]

*Curie, Smith & Maxwell* (W. Wickham Smith, of counsel) for the appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Appeal from Board of United States General Appraisers to the Circuit Court for the Southern District of New York transferred to this court:

<sup>1</sup> Reported in T. D. 31007 (19 Treas. Dec., 1059).



This is a question involving the validity of an appraisement proceeding wherein it is alleged by the importers that a commission of  $2\frac{1}{2}$  per cent on certain woolens and worsteds imported from Bradford and Huddersfield, England, was improperly assessed for duty. The goods were imported at the port of New York. Upon the invoices appear the notation, "Commission,  $2\frac{1}{2}$  per cent." Upon entry the importers first deducted the  $2\frac{1}{2}$  per cent commissions, and thereafter added the same, as hereafter appears.

There are three questions involved:

First: Was the  $2\frac{1}{2}$  per cent commission a dutiable item; or was it a plain, simple commission paid for receiving, examining, and other services not in connection with the actual market value of the merchandise?

Second. Was the inclusion, upon entry, of the  $2\frac{1}{2}$  per cent commission by the importers prompted by duress, and, therefore, not their voluntary act?

Third. What was the legal effect upon the subsequent proceedings, assuming the entry to have been made under duress?

The importers did not appeal to reappraisement claiming an illegal appraisement, but in due time protested.

The Board of General Appraisers found as facts:

1. That the services rendered by the commissionaire, which were assumed to be paid by the  $2\frac{1}{2}$  per cent, were the legitimate services of the commissionaire, and the payment for same was commissions, *which were not dutiable*.

2. That the addition made by the importer to the invoice, including such items of commissions, was voluntary, and that the collector was bound under the law to impose duty thereon.

3. That in appraising the wholesale market value the action of the appraising officer in adding the amount of the so-called commissions in the invoice was legal *so long as the appraised value did not exceed the wholesale market value of the goods*.

The importer appealed.

It appears that the principal duties of the commissionaire, for which this commission was paid, was to receive the goods after they had been manufactured and finished, unfold and compare them with the purchase samples, purchase the cases, and pack and ship the goods. Separate charges appear on the invoice for the cases and packing. The commission would seem to be a service connected with the fulfillment of the contract, rather than a performance of any of its terms. It entered into the cost of the goods to the importer but did not become a part of their actual market value. We think the record fully supports the finding of the Board of General Appraisers that the  $2\frac{1}{2}$  per cent was a commission, pure and simple, and in no wise entered into the actual market value of the goods. It was therefore a non-dutiable item. *Muser v. Magone* (155 U. S., 240); *United States v. Passavant* (169 U.S., 16); *United States v. Herman* (91 Fed. Rep., 116); *United States v. Kenworthy* (68 Fed. Rep., 904).

Approving this finding of the board, we proceed to the consideration of the second point in the case. Was the addition of the 2½ per cent commission on the entry of the importers constrained by duress? This is really the crux of the cases.

To constitute duress in a customs proceeding, or in any other proceeding wherein duress is exercised by a public official, physical menace is unnecessary. *Moral* duress is sufficient. One of the earlier cases is *Maxwell v. Griswold et al.* (51 U. S. [10 Howard] 242). In that case the court said:

The importer had put in his invoice the price actually paid for the goods, with charges, and proposed to enter them at the value thus fixed. But the collector concluded in that event to have them appraised, and the value would then, *by instructions and usage at New York*, be ascertained as at the time of the shipment, which was considerably higher, and would probably subject the importer not only to pay more duties, but to suffer a penalty.

The importer protested against this, but in order to avoid the penalty, under such a wrong appraisal, adopted the following course:

\* \* \* "And did make an addition to his invoice, so as to escape the penalty, by means of the addition, and the payment of the consequent increased duties."

The court said further:

We have already seen that the importer did not at first propose to enter his goods of such a value as to justify these increased duties. On the contrary, he insisted on entering them at only the price for which he purchased them, with charges, and thus agreeing with his original invoice, while the collector *virtually* insisted on having them appraised at their increased value as at the same time of the shipment, such being *the usage in the customhouse at New York, and such the requirement of the circular of the Secretary of the Treasury, November 24, 1846*. The importer, knowing that this would subject him to a severe penalty, in order to avoid it felt compelled to add to his invoice the amount which the price had risen between the purchase and the shipment.

But this addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued toward him.

Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality and without being able to regain possession of his property except by submitting to the payment.

All these requisites existed here. *We have already decided that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal.* The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. \* \* \*

He was unwilling to pay either the excess of duties or the penalty and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property

withheld from him on grounds manifestly wrong. *Indeed, it seems sufficient to sustain the action \* \* \* if the duties exacted were not legal and were demanded and were paid under protest.*

A close study of the Maxwell case seems conclusive of all the points in this case. There is nothing in that case which indicates that there was a personal communication to the importer from the collector or any officer of the customs as to adding upon entry, which he did, and claimed was done under duress. The recited things which impelled this action upon his part are, first, the usage in the customhouse at the port of New York, and, second, a circular of the Secretary of the Treasury previously issued covering the same. The court recites in this connection:

The importer knowing that this would subject him to a severe penalty, in order to avoid it felt compelled to add to his invoice.

The remonstrance which he filed was his protest.

The court said:

The collector *virtually* insisted upon having them appraised at the increased value—and styles this “moral duress.” This virtual insistence seems to have been expressed by the usage of the port and circular of the Secretary of the Treasury.

The court goes much further in the concluding sentence of the opinion, wherein it is stated:

Indeed, it seems sufficient to sustain the action, \* \* \* if the duties exacted were not legal and were demanded and were paid under protest.

Regardless, therefore, of the presence or absence of duress in the case, the Supreme Court in that case seems to have concluded that it is only necessary that the duties exacted be illegal, that they were demanded by the collector, and that legal protest was made. That they were demanded here seems sufficiently proven by the fact that they were paid and accepted.

It may be noted in passing that the character of the entries before us, with the additions noted, put it beyond the power of the appraiser to make any effective appraisement which would give relief to the importer, for regardless of whether the appraisement was above or below the entered value under the law the collector could not take duty at less than the entered value (customs administrative act, sec. 7). This being the case, it can not be assumed that the appraiser was further concerned in the ascertainment of a market value less than the entered value, and that this entered value, though involuntary, being before him was probably controlling in his appraisal.

What constitutes an involuntary payment made to a public official and the slight circumstances necessary in such cases to constitute involuntary payment received consideration in the case of *Swift & Co. v. United States* (111 U. S., 22). That was an internal-revenue

case. The complainants were manufacturers of matches, and the question affected an internal-revenue collection from them running over a long period of years. It was shown that the leading manufacturers of matches had made protest to the Bureau of Internal Revenue particularly against this method of computing commissions for proprietary stamps. *It did not appear that anyone in behalf of the claimant corporation, even after its organization, made any such protest, or before, until years later.* Later the claimant caused a letter to be written to the commissioner asserting its claim for the amount afterwards sued for. The commissioner, replying, denied the claim, asserting that the previous ruling would be followed. The court said:

From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissioners \* \* \*; that it refused on application prior to 1866 and subsequently to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all.

During this period of years the appellants continued doing business in pursuance of the prescribed methods of the bureau, and signed receipts, agreements, and settlements as prescribed by the bureau without further or other protest. The court further says:

\* \* \* The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We can not hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required. Money paid or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria*.

The court then quotes many others with approval; among these is *Ogden v. Maxwell* (3 Blatchford, 319), wherein the approval noted is as follows:

\* \* \* *It was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary.*

And, further, the court says:

No formal protest made at the time is by statute a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted; and the protests spoken of \* \* \* as having been made prior to 1866 by manufacturers of matches and others requiring such stamps are of no significance, except as a circumstance to show that *the course of dealing prescribed by the commissioner had been deliberately adopted, had been made known to those interested, and would*

not be changed on further application, and that consequently the business was transacted upon that footing because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced.

Robertson v. Frank Brothers Co. (132 U. S., 17) was quite similar to these in many particulars. On entry the importers noted:

Shipping charges added as required by the appraiser. \* \* \*

The same notation was made upon the invoice. The appraiser's notation was:

Value correct, with importer's additions.

The court instructed the jury as follows:

\* \* \* If he was required to do it, or given to understand by some officer in the collector's department that it would be the worse for him, seriously, if he didn't—as, for instance, if the appraiser told him if he didn't put those on there the collector's office would, that the appraiser would, and that he would be exposed to a penalty that would be assessed against him; if he was given to understand by the collector's department, or some officer of it, that if he didn't put these figures on there they should and make it the worse for him because he didn't and he would thereby be exposed to a penalty of a larger duty which he would have to pay for not doing it, and he was in that way for the sake of saving himself from the penalty which they would put upon him beyond what would otherwise be chargeable induced to put them on, then he is not bound by it.

The jury found in favor of the importer.

The court further stated:

We do not see how the verdict can be set aside for error in the charge on this point, unless the law be that *virtual or moral duress* is insufficient to prevent a payment made under its influence from being voluntary.

\* \* \* *In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one.* It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment.

In the particular cases it seems that it was the practice of the customs from 1883 to 1902 not to add this 2½ per cent to make market value on these so-called Bradford goods. About that time the Board of General Appraisers rendered a decision that these commissions were dutiable. As is well known in customs circles, the decisions of the board are promulgated throughout the trade generally and read and followed by customs brokers and importers as authority for their actions; that they are the guides as to market value and followed as authority by all collectors and appraising officers. It expressly appears in the record that this action of the board was so published and that information thereof was brought home thereby to the brokers

of these importers, and that immediately and continuously thereafter the collector and appraiser at New York followed this decision.

While the record is not clear whether or not this appellant firm was a party to the cases before the board, it is clear and undisputed that its customhouse brokers knew of these decisions, and a member of the appellant firm testified that these additions were made to prevent being assessed with penalties by virtue of said decisions.

The record contains plenary evidence that this ruling was brought home to this appellant and constrained his action with reference to these entries. They were made in November, 1903. The customhouse broker who made the entries testified:

That from October 3, 1883, to the fall of 1902 this item of commissions was not included in the dutiable value in such entries; that it was first included about July or August, 1902, at or about which time there was a decision of the Board of General Appraisers so holding, whereupon the practice was changed.

He further stated:

We first tried to add to it "Under duress," and the same was rejected by the collector. \* \* \* We put the words on the slip attached to the invoice; then we had to strike off the words "Added under duress." \* \* \* We then tried to attach a slip "Add 2½ per cent commission." \* \* \* This was also refused. We then had a stamp made "Add 2½ per cent commission to make market value," *which we use to the present day*. These entries are invariably thrown out and we have to put a pen through the word "commission," and after that word is stricken out the entry is accepted.

Another member of the appellant's broker's firm testified:

Question. State what has been the practice of the customhouse with regard to entries of this class of goods since these decisions where the 2½ per cent commission has not been added.

Answer. To my own knowledge and from my own experience I know that the 2½ per cent commission when omitted from the entry would have been added by the United States appraisers.

Question. And what would result in liquidation of duties from such an addition by the appraiser?

Answer. There would be a penalty equal to the advance.

Other brokers testified to the same usage at the customhouse.

The entry clerk at the customhouse in New York substantially corroborated the testimony quoted, and justified his actions by the statement that it was held at the customhouse that the importer had no right to put words upon his entry other than those approved by law, to wit, "add to make market value," and then testified as follows:

Question. The action taken by you or your office upon the last invoice called to your attention, in which an entry had been thrown out because the importer said "add 2½ commission under duress," the action taken by you in that case is the ordinary action that was taken and had been taken during all the time covered by these various entries in case such an entry was presented to the customhouse; is that right?

Answer. That is correct. When an entry was presented where it is stated that the addition is made under duress (it) was rejected and the importer's representative informed that it was optional with him whether he should make such addition or not.

All of the above testimony quoted, as well as that recited in this opinion concerning the usage of the New York customhouse, and the publication of the opinions of the Board of General Appraisers, and the efforts exerted by the importer's brokers to place upon their entries such a memorandum in protest of such payment as would support future action upon their part, or make proof of payment under duress by them, was presented for the first time under the old practice in the Circuit Court for the Southern District of New York, and was not before the Board of General Appraisers at the time of rendition of decision herein. This presents a vastly different record.

It is true that the collector did not insist that the  $2\frac{1}{2}$  per cent be added on entry, but it is equally true and fairly well established by this record that these importers knew, and there was brought home to them the knowledge, that if  $2\frac{1}{2}$  per cent was not added upon entry it would be upon appraisement and penalties accrue. Without quibbling upon the finer points of evidence, and coming straight to what must have been the facts of the case, as shown by the testimony, there could be no sound reason why the various classes of entries were tendered the collector except to register the importer's protest against the inclusion of this  $2\frac{1}{2}$  per cent as dutiable, and it was known to the importer, and his agents, that if they were not added the appraiser would add them. If this were not true, the broker and the importer were changing a policy of 20 years and performing idle acts without reason. Subsequently, and several years thereafter, to ascertain if the same practice was being observed by the collector, the importers again presented an entry to which was added their protest against adding the  $2\frac{1}{2}$  per cent, reciting that it was added under duress, and it was again rejected by the collector, showing that the practice was still being pursued at the customhouse. To say that the importers in these cases, in the presence of these conditions, were not constrained in their actions by the fear that unless they added on entry this  $2\frac{1}{2}$  per cent commission that they might be assessed in penalties, to say that they made this addition of their own free will and accord, would be to say that business men in the course of business were idly profligate of their money. We believe that it is fairly shown by the facts disclosed in this record, which differs from that before the board, that the addition put on the entries in this case, " $2\frac{1}{2}$  per cent commission," was induced by the fear in the minds of the importers that if they did not add upon entry it would be added by the appraiser, and that in event that decision went against them they would be assessed not only in additional duties, but in penalties. Under the decisions quoted that condition of mind inducing such plainly constitutes an involuntary act.

The language of the Supreme Court in *Robertson v. Frank Bros. & Co.* precisely paraphrases this situation, wherein the court said:

In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment.

If the entry was an involuntary act, it was not binding upon the importers, and the commission, being a nondutiable item as found by the board, its inclusion for dutiable purposes by the collector was an illegal act subject to correction in this proceeding. *United States v. Loeb* (107 Fed. Rep., 692); *United States v. Passavant* (169 U. S., 16); *United States v. Merritt* (123 U. S., 356).

We now come to the third point in the case. It will be noted that the Board of General Appraisers did not expressly find the market value of the goods, but rather announced a rule of law. We are of the opinion that, it having been determined that the 2½ per cent commission was a nondutiable item, and that its addition to the entries was induced by duress and involuntary, the case is concluded.

It is not within the province or jurisdiction of this court to make a finding of market value of imported merchandise. The law confides the ascertainment of market value to an appraiser, a single general appraiser, and a board of three general appraisers, and makes their finding of facts conclusive upon the world. Customs administrative act (sec. 13):

The only question reviewable by this court in such cases is whether or not any illegality in the proceedings of these respective officials has obtained. If so, the subsequent procedure is illegal. *United States v. Loeb* (107 Fed. Rep., 692); *United States v. Passavant* (169 U. S., 16); *United States v. Merritt* (123 U. S., 356).

If the entries in these cases were not the free will of the importer, but involuntary, they were illegal entries and were not binding upon the importer. *Maxwell v. Griswold* (51 U. S., 242); *Robertson v. Frank Bros. & Co.* (132 U. S., 17).

While there is no express declaration in the statutes as to the order of proceedings in customs administration, the whole framework of the statutes and regulations made thereunder are constructed upon the principle that entry must precede appraisement. By entry, which is made under oath and must be accompanied by the invoice or substituted invoice, or a bond to produce the same, the importer gains possession of his merchandise from the collector, taking it out of the possession of the Government into his own. Until entry is made, and unless made within a stipulated time, the collector is compelled under



the law to retain in his possession all of the merchandise. Upon the making of entry and filing of the bond all of the merchandise except required samples is released to the importer. That this has been the theory upon which the Government has proceeded for 30 years at least is shown by T. D. 4788, wherein the Assistant Secretary of the Treasury expressly declared that there could be no appraisement before entry. Moreover, that this was the assumption of the Congress is shown by section 2928 of the Revised Statutes, wherein in specified cases express authority is deemed necessary and given that appraisement may be had before entry. (See also T. D. 15631.)

By the Treasury Regulations of 1899, article 410, and section 7 of the customs administrative act of 1890, it is declared that the collector shall direct the appraiser to make appraisement. It is expressly declared in these regulations that to that end the collector shall select certain packages, designating the number and method of selection, and send them, with the invoice, *upon which shall be noted by the collector the entered value of the merchandise, "for the information of the appraiser."*

That regulation, which was in effect during the importations covered by this case, is as follows:

ART. 410. Every invoice, as soon as entered, shall be stamped with the date of the entry and certified by the signature of the collector or his deputy. \* \* \*

The rates of duty charged upon entry and *the entered value shall be duly stated on the invoice for the information of the appraisers.* \* \* \*

The collector shall then transmit all the papers to the naval officer, who shall \* \* \* check the invoice, entry, and permit, if found correct, and, retaining the duplicate entry, return the original and other papers to the collector, who will promptly *transmit the invoice to the appraiser.*

This regulation transcends no law, is fully authorized by the general statute directing the Secretary of the Treasury to make rules and regulations affecting the appraisement of merchandise. (R. S., 2949.)

There is no discretion, under the regulations, allowed the collector in this behalf, and it is mandatorily required that whenever he shall call for an appraisement he shall forward to the appraiser not only the samples of the merchandise but the entered value thereof stamped upon the invoice for his consideration in determining the market value of the merchandise.

In innumerable cases from the commencement of the Government to date it has been uniformly held that there could be no valid appraisement without samples before the appraiser.

Not alone this, but the appraising officers must proceed in the examination of these samples as required by law and the regulations, and any deviation therefrom would result in an invalid appraisement. *Converse v. Burgess* (59 U. S., 413 [18 How.]); *United States v. Passavant* (169 U. S., 16).

By a parity of reasoning we are unable to conceive how there could be a valid appraisement when the entered value of the merchandise is either not or is improperly indorsed upon the invoice, for that is one of the matters which the collector must certify to the appraiser for his information in arriving at actual market value. If the entered value certified to the appraising officer is one which is obtained through duress and involuntary and does not represent the opinion of the importer nor indicate his true estimate of the value of the merchandise, we see no escape from the conclusion that the regulations have not been complied with in the appraisement of such merchandise, and, not having been complied with, the appraisement is an invalid one.

The principle is precisely stated in *United States v. Passavant* (169 U. S., 16), wherein the court states:

\* \* \* While the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute. *Oberteuffer v. Robertson* (116 U. S., 499); *Badger v. Cusimano* (130 U. S., 39); *Robertson v. Frank Brothers Company* (132 U. S., 17); *Erhardt v. Schroeder* (155 U. S., 124); *Muser v. Magone* (155 U. S., 240).

Indeed, in the case of *Maxwell v. Griswold et al.* (51 U. S. [10 How.], 242), previously quoted, the Supreme Court in a case on all fours with this, where the illegality under consideration was duress in the making of the entry, stated concerning the appraisal as follows:

\* \* \* We have already decided that the demand for such an increased appraisal was illegal. *The appraisal itself, as made, was illegal.*

And the same pronouncement is made by the Supreme Court in the case of *Robertson v. Frank Brothers & Co.* (132 U. S., 17), quoted *supra*, wherein the addition was made to one of the entries in apprehension of the imposition of added duties and penalties; the court pronounced this such a divergence from the prescribed procedure as to render the proceeding illegal.

While it is urged by counsel for the Government that any irregularities were corrected by the character of the notation made by the appraiser in his certificate of appraisement, the notation in the *Robertson v. Frank Brothers & Co.* case was almost identical in language. The notations in these cases were as follows:

Full foreign market value is covered by entered value, which includes item X.

The item on the invoice marked "X" is "Commission 2½ per cent."

The importers' addition noted. Full foreign market value will not be covered with "commission" deducted.

The notation in *Robertson v. Frank Brothers & Co.* case was: "Value correct, with importer's additions."

In our view of the case, having held that the entry was an involuntary one, the proceedings thereafter were vitiated, and hence, however

regular may have been the proceedings of the appraiser in other respects, they were, for the reasons stated, invalid.

The only value of a reference to these notations made by the appraiser in his certificate of appraisement is to confirm the logic of the conclusions hereinbefore reached in that they show the certification by the collector to the appraiser of the entered value forms, and did, particularly in these cases, form the basis going to make up the judgment and decision of the appraiser as to the true market value of the goods, and that, this being an involuntary value, the collector failed in affording the appraiser correct information upon this point. Having so failed, contrary to the regulations in such case made and provided, we think the appraisement was invalid.

The collector should take duty upon the invoice value, it having been determined by the Board of General Appraisers that the 2½ per cent commission upon these invoices was not a dutiable item, and that determination having been approved by this court, it is the duty of the collector to proceed to liquidation without including this commission as a dutiable item in these particular cases. The decision of the Board of General Appraisers is reversed.

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THE PANTASOTE CO. v. UNITED STATES (No. 38).<sup>1</sup>

MILLBOARDS.

Millboards made of refuse paper and bent or curved in form for use in ceiling cars are not dutiable under paragraph 402, tariff act 1897, but were dutiable as manufactures of paper under paragraph 407 of said act.

United States Court of Customs Appeals, October 18, 1910.

TRANSFERRED from the United States Circuit Court, Southern District of New York,  
Abstract 22034 (T. D. 30086).

[Affirmed.]

*Joseph G. Kammerlohr* (*John Gibbon Duffy* on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin A. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This case comes up by transfer from the United States Circuit Court for the Southern District of New York.

This merchandise, described in the appraiser's return as millboards, is imported, first, rectangular sheets or boards, 2 feet by 4 to 6 feet by 12; second, similar boards glued or joined together to make greater dimension of surface; third, similar boards bent or curved to a concave form. They were assessed for duty as manufactures of paper at 35 per cent ad valorem under the provisions of paragraph 407 of the tariff act of 1897. The importer claims they are properly

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<sup>1</sup> Reported in T. D. 3008 (19 Treas. Dec., 1070).

dutiable under paragraph 402 of the same act at the rate of 25 per cent ad valorem, as paper hangings or paper not specially provided for.

The board followed in part another of its decisions, the record of which does not accompany this record, and held the flat sheets dutiable as paper and the curved sheets dutiable as manufactures of pulp, and gave decision accordingly. The importer appeals from the latter holding only.

But one witness appeared at the hearing. He was the examiner at the appraiser's department. He passed the merchandise and was called by the importers as their witness.

The issues presented in this case involve several questions, to wit, the substance from which the merchandise is manufactured, the processes of manufacture through which the articles as imported has gone from the raw material to the imported state, the subsequent use of the merchandise as imported and its ready fitness for such use in the condition imported, and name, if any, by which it was generally uniformly known in trade and commerce as imported prior to July 24, 1897.

Evidently the examiner alone who testified as to having passed the goods originally gave all the information upon the subject disclosed by the record. When asked at the hearing of what the merchandise was made, he testified it was made from "refuse paper-refuse paper stock; usually of a cheap refuse paper or of rope," and when asked how the curved articles were fashioned he testified the only information he had on the subject was hearsay gleaned from the importer. When asked whether he had any information as to whether or not the bent boards were in shape for final use as imported, he said he had no definite knowledge on that subject; and to the question whether or not they had yet to be cut to sizes, he said "they seem to be appropriate for use in the cars."

As to the flat goods, the testimony upon which the board ruled does not accompany this record. Though that portion of the decision was not appealed, we are unable to say how far that record supported the other findings of the board in its absence.

While the testimony in this case, shown by this record, is meager and unsatisfactory, the conclusions of the board are presumably correct. The presumption of law attending official action supports that conclusion.

In *United States v. Schering* (123 Fed. Rep., 65) the Circuit Court of Appeals for the Second Circuit, in laying down that familiar principle of law, stated its application to customs laws in language as follows:

Where the classification of merchandise depends upon the existence of specified descriptive characteristics, it is to be presumed in favor of a correct classification that those characteristics were found by the officers of customs. These officers are

selected by law for the express purpose of deciding these questions. They are empowered and required to pronounce a judgment in the case, and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. *United States v. Rosenwald* (67 Fed. Rep., 323); *Arthur v. Unkart* (96 U. S., 122); *Muser v. Magone* (155 U. S., 240).

We have heretofore recited the issuable facts in this case. Opportunity was offered the importer to introduce testimony establishing in his favor any of these issuable facts. The only evidence introduced was that of the examiner, which tends rather to support the issuable facts as found by the board than to controvert them in this case.

Basing our decision solely upon this ground, the decision of the Board of General Appraisers is *affirmed*.

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### BEST v. UNITED STATES (No. 163).<sup>1</sup>

#### PATENT EAR CAPS.

A child's cap made of elastic braid or straps, connected by narrow bands of cotton tape and designed to prevent the ear from growing abnormally and held in position when spread closely over the skull by being knotted under the chin, is not a bit of cotton wearing apparel and dutiable under paragraph 314, tariff act of 1897, but is a brace, rather, and was dutiable under paragraph 320 of said act.

United States Court of Customs Appeals, October 18, 1910.

TRANSFERRED from the United States Circuit Court, Southern District of New York,  
G. A. 6941 (T. D. 30121).

[Reversed.]

*Kammerlohr & Duffy* (*Joseph G. Kammerlohr* on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

HUNT, Judge, delivered the opinion of the court:

Appellants, Best & Co., in December, 1908, imported merchandise known as Claxton's patent ear caps. The collector at New York classified the articles as cotton wearing apparel, under the provisions of paragraph 314 of the tariff act of 1897, which reads as follows:

314. Clothing, ready-made, and articles of wearing apparel of every description, including neck-ties or neckwear composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem: *Provided*, That any outside garment provided for in this paragraph having india rubber as a component material shall pay a duty of fifteen cents per pound and fifty per centum ad valorem.

The importers urged that the ear caps were entitled to entry at the rate of 45 per cent, either under paragraph 320 of the tariff of 1897

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<sup>1</sup> Reported in T. D. 31009 (19 Treas. Dec., 1072).

or under the provision for manufactures of cotton in paragraph 322. These paragraphs, so far as necessary to the case before us, are, respectively, as follows:

320. Bandings, beltings, bindings, bone casings, cords, garters, linings for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber, \* \* \* rubber or otherwise \* \* \*, forty-five per centum ad valorem; \* \* \*.

322. All manufactures of cotton not specially provided for in this act, forty-five per centum ad valorem.

Upon review of the decision of the collector, the Board of General Appraisers heard testimony as to the manufacture and use of the articles, and thereafter held that they were properly dutiable as wearing apparel under paragraph 314, already quoted, and sustained the action of the collector. An appeal was taken by the importers to the Circuit Court for the Southern District of New York, but before decision by that court the record was certified to this court, pursuant to section 29 of the act of Congress approved August 5, 1909, which provided that upon the organization of the Court of Customs Appeals cases within the jurisdiction of this court pending and not submitted for decision in any United States circuit court should be certified to the Court of Customs Appeals for further proceedings.

It is therefore before us for review of the decision of the Board of General Appraisers.

We are constrained to disagree with the ruling of the Board of Appraisers, and to exclude the articles from within any definition of wearing apparel under section 314. The caps are made to be worn by children in the nursery and during sleep. They consist of a series of elastic braid or straps, connected by narrow bands of cotton tape—a network of narrow bands—which spread closely over the skull and are held in position by being knotted under the chin, the arrangement being such that when tied the ears are drawn or pressed close to the head of the wearer. The purpose of the cap is to hold the child's ears close to the head in order to prevent the disfigurement of the standing out of the ears. It is also claimed that by wearing them at night children's hair will not become disarranged, and that a child who wears one while sleeping will unconsciously acquire the habit of breathing through the nose instead of through the open mouth. But these two latter claims are of no real importance, for it is evident from an inspection of the article and from the record that the only substantial purpose of the cap is to prevent or relieve a mild deformity by pressing the ears close to the head. Plainly the article is not an ear cap to protect the ear against cold, nor is it possible to conceive of its being worn for adornment. As we must find that the prevention of physical misshape is what the caps are intended for, it would be unreasonable to classify them as wearing apparel under section 314.

In our opinion the ear caps are best described as braces, and ought to be classified under paragraph 320. They are braces in that they hold the ears of the wearer firmly in a position close against the head. Thus the cap braces the ears, and by pressure a tendency of the ear to lean and grow outward is sought to be relieved.

United States *v.* A. Steinhardt & Bro. (141 Fed Rep., 494; T. D. 12112) is not directly pertinent, because the court there dealt with garters, and decided that they were wearing apparel. With that ruling we should probably be in accord; but here we have merchandise of a very different character.

The decision of the Board of General Appraisers is reversed, and the cause is remanded with directions to proceed as herein indicated.

DE VRIES, Associate Judge, being disqualified, took no part in the hearing or decision of this case.

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UNITED STATES *v.* SUSSFELD (No. 9). UNITED STATES *v.* BERST  
(No. 51).<sup>1</sup>

MOVING PICTURE FILMS—PHOTOGRAPHS.

Cinematograph, or moving picture, films are photographs and were dutiable under paragraph 403, tariff act of 1897.

United States Court of Customs Appeals, October 28, 1910.

APPEALS from the Circuit Court of the United States for the Southern District of New York (T. D. 30146—T. D. 29643).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

*Comstock & Washburn* for J. A. Berst; *Curie, Smith & Maxwell* for Sussfeld, Lorsch & Co., appellees.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These appeals are from a decision of the Circuit Court for the Southern District of New York affirming the decision of the Board of United States General Appraisers, G. A. 6889 (T. D. 29643).

The importations in question were moving-picture films, so called. The articles had been assessed for duty at 65 cents per pound and 25 per cent ad valorem as celluloid articles, under the provisions of paragraph 17 of the tariff act of 1897, which reads as follows:

Collodion and all compounds of pyroxylin, whether known as celluloid or by any other name, fifty cents per pound; rolled or in sheets, unpolished, and not made up into articles, sixty cents per pound; if in finished or partly finished articles, and articles of which collodion or any compound of pyroxylin is the component material of chief value, sixty-five cents per pound and twenty-five per centum ad valorem.

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<sup>1</sup> Reported in T. D. 31030 (19 Treas. Dec., 1103).

The importers claimed that the articles were properly dutiable as photographs under paragraph 403 of said act, which reads as follows:

Books of all kinds, including blank books and pamphlets, and engravings bound or unbound, photographs, etchings, maps, charts, music in books or sheets, and printed matter, all the foregoing not specially provided for in this act, twenty-five per centum ad valorem.

and, alternatively, that the articles were dutiable as photographic dry plates or films under paragraph 458.

The Board of Appraisers and the circuit court sustained the protest, holding that the importations were properly classified as photographs, and the Government brings the case here by appeal.

The evidence in the record satisfies us that these articles are photographs. They come within the definition given in the Standard Dictionary of a photograph, namely, "a picture taken by photography; a picture due to the action of light on a sensitized film which may have for a support glass, celluloid, paper, or other suitable material." Not only is this true, but in the case of *Edison v. Lubin* (122 Fed. Rep., 240) the Circuit Court of Appeals for the Third Circuit held directly that these articles were photographs. That case was one in which the complainant proceeded under the copyright law, but the discussion of the subject of whether these are or are not photographs is full and complete. (See also *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. Rep., 262; *Edison v. American Mutoscope Co.*, 114 Fed. Rep., 926; and *Edison v. American Mutoscope & Biograph Co.*, 151 Fed. Rep., 767.)

So we find that the importations in question are in fact photographs; that like articles have been judicially determined to be photographs; and that photographs are named *eo nomine* in the section invoked by the importer. It would seem, therefore, that unless some excellent reason can be furnished for giving the term photograph as used in the tariff act a different meaning from that which is given by the lexicographers and by the courts, the decision of the circuit court was right.

It is urged in the brief of counsel for the Government that the Federal cases cited are not in point, for the reason, as stated, that extreme liberality marks the interpretation of the copyright laws, and that decisions under that statute are unsafe precedents to follow in construing the tariff law. We need not determine whether counsel for the Government is correct in asserting that the courts are uniformly liberal in construing the copyright laws. If he is correct in this, it is equally true that the courts are liberal in favor of the importer in construing revenue statutes. See *Hartranft v. Wiegmann* (121 U. S., 609); *Swan & Finch Co. v. United States* (190 U. S., 143); and *Eidman v. Martinez* (184 U. S., 583).

It is further urged by the appellant that by a long-continued construction of the Treasury Department and the Board of Appraisers



prior to the naming of photographs *eo nomine* in the tariff act, which first occurred in the act of 1890, as well as since that time, has placed a meaning upon the term "photograph" which limits it to photographs on paper. We have examined with care the various Treasury decisions cited. It can be said of them that none of the cases deals with precisely such an article as that involved in this case. It is true that the department, prior to the tariff act of 1890, classified photographs by similitude as engravings, and usually limited such classification to photographs on paper, although the cases in which this question arose were usually cases where the photographs were mounted on glass and where the glass was the article of chief value. But in T. D. 6168, covered mounted photographs were held dutiable at 25 per cent ad valorem by similitude to engravings. The decision says:

The articles consist of photographic views of important places abroad, which are framed and mounted in a cheap manner for the purpose of being used in an instrument called the stereopticon. The sample transmitted indicates that the photographic view is the leading feature and portion of chief value, and that the mounting and frame are only incidents in connection with the proposed use of the view.

So it would appear that prior to the tariff act of 1890 these articles were classified either as engravings by similitude or as unenumerated manufactured articles. But, as before stated, we have discovered no decision in which articles of precisely the character of the present were classified according to the material of which they were composed.

We think there was no such established meaning to these words as prevents our giving them their commonly accepted meaning and the meaning judicially ascribed to these words by courts of high authority. The case was rightly decided and the decision of the circuit court and of the Board of General Appraisers is affirmed.

DE VRIES, Associate Judge, being disqualified, took no part in the hearing or decision of this case.

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### UNITED STATES *v.* HABICHT (No. 10).<sup>1</sup>

#### 1. NONIMPORTATION.

Merchandise the usefulness of which as a commercial commodity has been entirely destroyed and that has been condemned and destroyed as unsanitary is not an article of merchandise of value imported into this country and can have no dutiable status.

#### 2. PROCEDURE AS TO NONIMPORTATION.

Where an importer has removed in bond to his own warehouse a consignment of merchandise, and it is there found that more than 10 per cent of the consignment had been rendered in transit totally valueless he is not remitted as of course to proceeding alone under section 23 of the customs administrative act of 1890, but may seek his remedy as well by protest under section 14 of the same act.

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<sup>1</sup> Reported in T. D. 31031 (19 Treas. Dec., 1105).

## 3. GLACÉ FRUIT, WHEN A NONIMPORTATION.

The facts disclosing that 29 cases and 59 boxes of glacé fruit, more than 10 per cent of the entire consignment, were entered in a wholly worthless condition, there was no importation as to this portion of the merchandise, and the importer complying with all conditions as to recovery is entitled to the relief he demands.

## 4. BOND AND PENALTY.

The penalty of a bond given for the return of goods not examined by customs officials is not enforceable in a proceeding of this kind, the court declining to assume jurisdiction of questions arising out of the alleged breach of the conditions of such a bond.

United States Court of Customs Appeals, October 28, 1910.

APPEAL from the Board of United States General Appraisers, G. A. 6700 (T. D. 28651), to the United States Circuit Court for the Southern District of New York (T. D. 29768); thence to United States Circuit Court of Appeals and transferred.

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

*McLaughlin, Russell, Coe & Sprague* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the United States Circuit Court for the Southern District of New York (171 Fed. Rep., 441), in which that court reverses a decision of the Board of United States General Appraisers, which affirmed an assessment of duty as made by the collector of customs at the port of New York. The merchandise consisted of glacé fruit imported at that port in December, 1906; the shipment consisting of 41 cases. Duty was assessed by the collector upon the total number of cases included in the shipment. Within 10 days after entry the importer served notice upon the collector that 29 cases and 59 boxes of the fruit had arrived in a damaged condition, that they constituted over 10 per cent of the entire shipment, and asked to abandon the goods. The application was duly received and an examiner from the appraiser's office designated to examine the goods. Previously the goods had been sent to the place of business of the importer under bond. This was a general bond, such as is customarily given for the delivery of goods to importers, covering this and such other merchandise that they might import for a period of six months and containing the stipulation that any of the goods imported thereunder would—

within 10 days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs.

When the examiner appeared at the place of business of the importer he found that the packages had already been opened and the goods taken out; whereupon he made return of such conditions through the appraiser to the collector, in response to which the collector reported to the importer—

that the merchandise could not be identified for the reason that the package had been opened and the contents distributed before the examination could be made, and hence the application was rejected.

Within 10 days, however, after the decision of the collector as to the amount of duties charged upon the importation, and not before such ascertainment and liquidation of duties by the collector, the importer duly made protest against the exaction of an undue amount of duties, setting forth distinctly and specifically the reasons of his objection in that "29 cases and 59 boxes of importation of 41 cases of said fruit were totally destroyed for merchantable purposes before importation." Said claim was made under and by virtue of section 14 of the customs administrative act of 1890, as amended July 24, 1897, and no objection is made to the form or timeliness of such protest.

The protest is based upon two grounds:

First, it is alleged that the "merchandise was damaged by sea water during the voyage of importation, thus causing fermentation and decay of the fruit, whereby the contents of 29 cases and 59 boxes were totally destroyed for merchantable purposes before importation, and the same had to be thrown away as worthless."

Second, 29 cases and 59 boxes of the merchandise were damaged, and permission was asked to abandon to the Government this quantity of the fruit under the provisions of section 23 of the tariff act of 1897, and tender made to establish by proof in conformity with the legal rules of evidence the facts alleged in the protest.

Upon the hearing before the Board of United States General Appraisers the protest was overruled on both grounds, and upon appeal to the United States Circuit Court for the Southern District of New York the decision of the board was reversed.

Appeal was taken to the United States Circuit Court of Appeals for the Second Circuit and the case comes here from that court.

Fundamental to an intelligible consideration of the case an inquiry into the established facts is essential. The main question of fact is whether or not the merchandise could be considered as destroyed or unsuitable for commerce before importation, and hence a nonimportation; or whether or not it should be considered an importation of merchandise which was merely damaged.

The Board of General Appraisers found its condition in the following language: "The testimony shows that the merchandise which has

been wet was entirely valueless, condemned by the health officers, and destroyed." The Circuit Court for the Southern District of New York reached the same conclusion as the basis of its decision.

While the 29 cases and 59 boxes seem to have been in the original packages upon arrival, an examination of the record convinces us that they were undoubtedly worthless as articles of commerce. They were, in fact, condemned by the health officers of the city of New York and destroyed. It is fairly shown from the record that at the time they entered the customs district they were in the condition as found by the Board of General Appraisers. We have no hesitancy in approving this finding as in complete accord with the facts and decisions of the highest courts. In *Lawder v. Stone*, collector (187 U. S., 281), the importation was a cargo of pineapples at the port of Baltimore. Part of the cargo decayed en route, was condemned by the health officers of the city of Baltimore, and destroyed. The Supreme Court in deciding the case refers to various decisions, not only of the courts but of the Treasury officials and Board of General Appraisers, and the statutes from the commencement of the Government to date. It lays down the following principles as to what constitutes nonimportation:

The doctrine \* \* \* clearly supports the proposition that it would be inequitable and presumably not within the intention of Congress to assess duty upon an article which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay, or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption. In other words, that articles thus circumstanced were not in truth within the category of goods, wares, and merchandise imported into the United States, within the meaning of the tariff laws. The ruling in *Marriott v. Brune* was approved and applied in *United States v. Southmayd* (9 How., 637), \* \* \* and it has been consistently recognized by this court that as a general rule *duties are intended to be levied only upon the value of goods which possess some intrinsic or other value at the time when ordinarily the duty would attach on an article.*

And further the court, at page 293, says:

The reference in section 23 to an allowance for "damage," and the provision that the abandoned portion of cargo should "be sold by public auction or otherwise disposed of for the account or credit of the United States," manifestly imports that it related to an article which, *when the duty attached, was possessed of some value*, and therefore negatives the idea that Congress was concerning itself with that which was destitute of all value. When, therefore, it was enacted that in a certain contingency no allowance should be made for "damage to goods, wares, and merchandise imported into the United States," it is reasonable to construe this language as not referring to *an article, case, or package which, though in the semblance of merchandise, had become absolutely valueless* by reason of natural causes or casualty occurring thereto while the article, case, or package was in transit to the United States.

There seems no escape from the conclusion that this merchandise, the usefulness of which as a commercial commodity was entirely

destroyed, and which was condemned and destroyed as insanitary, should not be held to be an article of merchandise of value imported into the United States. We fully approve the finding of the Board of General Appraisers upon this point.

It was, however, held by the board that by reason of the fact that the merchandise had been unpacked by the importer without calling in a customs official, in violation of the terms of the bond mentioned, that the importation should not be treated as a nonimportation, for the reason that it had passed into the limits of the United States and entered conditionally into the commerce. If, as is conceded by all parties, at the time the merchandise entered the customs district it was worthless, and hence a nonimportation or shortage and nondutiable, we are unable to conceive how any subsequent act of the importer not changing its valueless character could restore it to a dutiable status. We are of the opinion that at least the importers' first ground of protest is well taken.

The statutes and Treasury regulations made in conformity therewith contemplate two conditions affecting merchandise such as this: First, merchandise that has been damaged but not entirely destroyed, but which still possesses some commercial value and, secondly, merchandise, or a portion thereof, which had been commercially destroyed before it was brought within the customs district.

For the enforcement of the rights of the importers in these cases Congress has specifically prescribed methods of procedure. That Congress has plenary power in this particular has been uniformly held from the foundation of the Government. It has never been seriously disputed that in matters of claims against the United States full power rests in Congress to determine and legislate exactly as to the methods of determination of these controversies, and the modes prescribed by Congress measure the rights of the citizen.

Thus in *Nichols v. United States* (74 U. S., 7 Wall., 126) the Supreme Court said:

The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, *it is only on such terms and conditions as are prescribed by statute*. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the Government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support without infinite embarrassments and delays if it was subject to civil processes same as a private person.

This case was expressly approved in *Dooley v. United States* (182 U. S., 222), wherein the Supreme Court points out that by virtue of the customs administrative act of 1890, further enlarged jurisdiction

in this particular was given and an appeal provided. To the same effect is *Schillinger v. United States* (155 U. S., 166), wherein the court said:

The United States can not be sued in their own courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and the contingencies in which the liability of the Government is submitted to the courts for judicial determination. *Beyond the letter of such consent the courts may not go*; no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government.

In the matter of imposts collected upon a nonimportation of merchandise, or upon merchandise which was damaged at the time of importation, two provisions have been prescribed by Congress.

Section 23 of the customs administrative act of 1890, as amended July 24, 1897, prescribes a method of relief for the importer for the recovery of duties paid upon merchandise which has been *damaged*. It is expressly provided in that section that such a recovery shall be had after compliance with the rules and regulations made by the Secretary of the Treasury for the enforcement of such rights.

Section 14 of the same act provides a remedy for the importer in all cases where the *rate* or *amount* of duty exacted upon imported merchandise is deemed by him excessive.

It seems that the importer in this case endeavored to invoke both remedies. Inasmuch, however, as he had taken the goods into his possession and opened them before they were inspected by a customs official, in violation of the statutory bond given, he abandoned procedure under the provisions of section 23 of the customs administrative act.

But, as before stated, in due time he proceeded by protest under the provisions of section 14 of the customs administrative act. Under that provision there is no statutory regulation of which we have been advised which prescribed the performance of any condition precedent to that of the filing of protest by the importer and asserting of his claim in this manner for the refund of excessive duties paid, except the payment of the full amount of the ascertained duties, which was done in this case.

There is nothing in the case of *D. M. Ferry & Co. v. United States* (85 Fed. Rep., 550), Circuit Court of Appeals for the Sixth Circuit, opinion written by Taft, circuit judge, which expressly or impliedly denies the right of the importer to proceed under section 14 of the customs administrative act for the recovery of an excessive amount of duties paid by reason of a nonimportation or shortage, provided he proceeds in due time and under the provisions of that law. On the contrary, the plain and explicit intimation in that decision, as well as in the case of *Nichols v. United States* (74 U. S., 7 Wall., 126),

relied upon and quoted in the *Ferry* case, is that the importer in such cases has the right to proceed by protest, as provided by law.

In the *Ferry* case the goods had been imported but were destroyed thereafter in the warehouse of the importer while a bond to return them upon demand to the custody of the collector was in existence. The importer made due claim before the Secretary of the Treasury for relief under section 2984 of the Revised Statutes, a special procedure, similar to that of section 23 of the customs administrative act of 1890, and that being rejected proceeded by petition in the United States circuit court. The court of appeals held that there was no jurisdiction in the circuit court to review the decision of the Secretary of the Treasury, as the statute had confided in the Secretary, under section 2984 of the Revised Statutes, the power to grant relief in such cases, and inasmuch as the importer had invoked that procedure the decision of the Secretary could not be reviewed by the courts for want of statutory authority.

The court, in commenting upon *Nichols v. United States* and following the same, specially emphasized the fact that no protest had been filed in accordance with the customs administrative act, and stated the facts of the *Nichols* case to be as follows:

A portion of the liquor had leaked, and, being lost, was, in fact, *never imported at all into the United States*. *The importers made no written protest, as required by the customs law of the United States*, but some five years afterwards filed a petition in the Court of Claims.

The court then quotes the *Nichols* case as to the authority of Congress to confide in special tribunals methods of procedure in such cases, and emphasizes the language of the Supreme Court in the *Nichols* case, wherein it is stated:

· If the importer does not protest, his right of action is gone.

In the *Nichols* case it was distinctly held that in the case of nonimportation of merchandise the remedy was by protest.

In the case of *damage* to merchandise the remedy is to proceed under the provisions of section 23 of the customs administrative act, because that remedy is by the terms of the law made exclusive for such rights. In the *Ferry* case the court held that because of the peculiar conditions of the case, to wit, that the merchandise was destroyed while in the custody of the importer after importation, and the importer having undertaken the remedy provided by section 2984 of the Revised Statutes, and that remedy alone, the decision of the Secretary was final. Indeed that was the exclusive remedy and the court later said being denied no recovery was possible.

The court in the *Ferry* case, however, in no case holds or intimates that in a case of nonimportation the importer could not proceed by

timely protest in due form. On the contrary, it quotes the Nichols case, which plainly holds that that is the only remedy in such cases. And this was the view later by the circuit court in this case.

In the second instance, certain preliminary steps are prescribed by section 23 of the customs administrative act and other cognate statute and regulations before the importer can duly demand relief. In the absence of any conditions precedent, statutory or regulative, other than that cited, and in the presence of a nonimportation of the whole or any part of the cargo, the importer undoubtedly has the legal right to proceed by protest, and when proof of the necessary facts therein alleged is sustained before the proper tribunal is entitled to a refund accordingly. The Board of General Appraisers having found that in this case the 29 cases and 59 boxes were totally worthless, we see no escape from the conclusion that there was a nonimportation as to that portion of the merchandise, and that the importer having complied with all conditions as to recovery is entitled to the relief demanded.

It is insisted by the Government in its brief, however, that the fact that the importer had violated his bond, which was a general one covering all importations he might make for a period of six months, should operate as an equitable estoppel in the assertion of this protest. The circuit court did not concur in this view, and we are of the opinion that the circuit court was correct. Demonstration of this can be had, it seems to us, by considering the legitimate sequence of such a view by this court. This court by such a holding would proceed to determine the rights as between the Government and the importer upon a bond of which in this proceeding, at least, it concededly has no jurisdiction. Furthermore, the determination by this court that the penalty for a violation of this bond, if it were violated, by the importer should be the amount of duties paid upon this merchandise would be the fixing of a penalty against the importer and in favor of the Government, which is in no sense authorized by the terms of the bond. This court, in our opinion, can not assume jurisdiction of questions arising upon this bond or proceed to measure out a penalty for a violation thereof. Counsel for Government has apparently recognized in his brief that such a holding could not be arrived at except upon a strained equitable basis, and stated that if the Government can not recoup in this proceeding it has no remedy. If equity is to be administered in the premises, it would be in a proceeding upon the bond direct, and if it be found in such or in this proceeding that the Government by reason of the character of the bond or otherwise, is without remedy, that is a matter for the Congress or, perhaps, the Secretary of the Treasury, who has the plenary power of making regulations affecting the collection of the customs. It is not within the province of this court to repair or make statutes or regulations. The decision of the circuit court is affirmed.



ULLMAN v. UNITED STATES (No. 19).<sup>1</sup>

## 1. RATE ON ENTRY OF GOODS DEPRECIATED IN VALUE.

Where imported merchandise offered for entry has depreciated from its invoice value, the rate of duty is to be determined by considering not alone section 19 of the customs administrative act of 1890, but effect must be given to section 7 of said act and the duty should not be assessed in any case upon an amount less than the invoice or entered value.

## 2. TREASURY REGULATION OF APPRAISEMENT, FORCE OF.

A regulation issued by the Treasury Department permitting entry by appraisement without invoice is not valid, in so far as the regulation might be construed to abrogate section 7 of the customs administrative act of 1890, requiring that in no case shall an assessment be fixed on an amount less than the invoice or entered value.

United States Court of Customs Appeals, October 28, 1910.

APPEAL from Board of United States General Appraisers, G. A. 6918 (T. D. 29883), to United States Circuit Court, Southern District of New York (T. D. 30298); appeal thence to United States Circuit Court of Appeals and transferred.

[Affirmed.]

*John Giblon Duffy* (*Joseph G. Kammerlohr* of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

Appellant entered at the port of New York a quantity of sealskins under a consular invoice showing the cost to him, and at the same time offered evidence to the collector to show that after the date of the purchase of these skins in London the market value had materially decreased, and sought to enter his merchandise at the correct market values as of the date of exportation to this country. This offer was accompanied by papers showing the correct market value. The collector indorsed upon these papers his rejection of the same, and ordered that the entry be made at the actual purchase price, which was done accordingly. The case came before the appraiser for appraisement, and that officer appraised the goods at the invoice price. It appears that this action was purely perfunctory and based upon a construction of the law which, in his view, made it imperative that he should assess at not less than the invoice value.

The question presented for decision, therefore, is whether on the undisputed facts, where it appears that the invoice value was greater than the actual value of the goods at the date of exportation to this country, the invoice value or the actual value was the proper basis for assessment.

The material provisions of law to be considered are the following:

Furs, dressed on the skin but not made up into articles \* \* \* twenty per centum ad valorem. (Paragraph 426, tariff act of 1897.)

\* \* \* The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value. (Sec. 7, customs administrative act.)

<sup>1</sup> Reported in T. D. 31032 (19 Treas. Dec., 1113).

That whenever imported merchandise is subject to an ad valorem rate of duty \* \* \* the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States. \* \* \* (Sec. 19, customs administrative act.)

It is insisted by the appellant that by the very terms of the act imposing the duty on an ad valorem basis the basis of actual value is to be implied. This, in the absence of other provisions of the tariff law, would undoubtedly be correct.

It is further insisted that section 7 of the customs administrative act under which the assessment was made at the invoice value is controlled by section 19 of the same act, which provides that the duty shall be assessed upon the actual market value or wholesale price as bought and sold in usual wholesale quantities at the time of exportation to the United States, and the rule is invoked that where a conflict is found between two statutes or two sections in the same statute the later provision must prevail as the latest expression of the legislative intent.

This is without doubt the general rule of construction. If it has application with full force to this case the appellant's contention must be allowed. But this rule is subject to certain recognized exceptions and should never be applied except in case where the repugnancy between the two provisions of the statute is irreconcilable. The statute is to be construed with reference to other statutes in *pari materia*, and as is well stated by the author in *Endlich on Interpretation of Statutes*, section 183, by a general survey of the whole context, and the provisions are to be made to stand together if possible.

The Supreme Court has applied this modification of the rule in construing revenue laws. As was said in *United States v. 67 Packages of Dry Goods* (17 Howard, 85):

In the interpretation of our system of revenue laws, which is very complicated, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication where a subsequent one has made provision upon the same subject and differing in some respects from the former, but have been inclined to uphold both unless the repugnancy is clear and positive so as to leave no doubt as to the intent of Congress.

If we apply this rule and consider the history of the provisions under consideration, we think little doubt can be left that it was the intention of Congress to perpetuate the provisions of section 7, which are not new to the tariff laws, but have been in one form or another embodied in every tariff enactment since 1818, so far as our examination has enabled us to determine. Not only is this true, but this law has been applied where there was the same room for contention for a repeal by subsequent enactment as there is in this case for the claim of repeal by a later provision of the same statute. The case of *Kimball v. Collector* (10 Wallace, 436) is in point.

The contention now urged was made to very similar provisions in the case of *Ballard v. Thomas* (19 Howard, 382). The eighth section of the act of 1846 provided "that under no circumstances shall the duty be assessed upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding."

It was claimed that this section had been repealed by the act of Congress of March 3, 1851, which provided that the collector should "cause the actual market value, or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported \* \* \* to be appraised \* \* \* and to such value or price shall be added all costs and charges, \* \* \* as the true value at the port where the same may be entered \* \* \*."

It was said:

Previous to this act, the time when the value of the article in the foreign market was to be ascertained was the time of the purchase, now, by the act of 1851, the time of exportation. There is no change, however, in the rule which must govern in making the valuation—it is the actual market value or wholesale price in the principal markets of the country from which the article shall have been imported. The only real change, therefore, in respect to this matter, under the law of 1851, from that of 1842 and 1846, would seem to be a change of the time when the valuation is to take place, without intending to interfere with any other of the regulations in the former laws.

The court therefore sustained both provisions.

We conclude that section 19 and section 7 are to be read together, and that section 19 is qualified by section 7; that when an actual assessment is made upon information to be derived by the collector, the assessment is provided for by section 19; but that, reading section 7 in connection with section 19, there is a clear limitation placed upon the action of the collector, and that in no case can the assessment be less than the invoice or entered value.

As was intimated by the court in *Kimball v. Collector* (supra), the redress for such a grievance as exists in the present case should be sought in Congress, and it is proper to note that Congress in the tariff act of 1909 has amended section 7 so as to permit of the entry at less than the purchase price where injustice would otherwise be done.

It is further claimed that article 1450 of the Customs Regulations of 1899 gave the right to the importer to have his goods entered at the lower rate. Section 251 of the Revised Statutes imposes upon the Secretary of the Treasury the duty to prescribe rules and regulations *not inconsistent with law* to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws or in carrying out the provisions of law relating to revenues from imports, or to duties on imports, or to warehousing. Manifestly, the first requisite as to a regulation by the collector is that the rules prescribed shall not conflict with existing law. Acting under this pro-

vision of the statute, the Secretary of the Treasury issued article 1450 of the Customs Regulations of 1899 so called, which reads as follows:

In cases where it has been clearly shown that the invoice value of an importation was far beyond the general market value of similar goods at the time of exportation, entry by appraisement without invoice may be allowed with the approval of the Secretary of the Treasury in each case.

Passing by the fact that the approval of the Secretary of the Treasury was sought in this case and denied, and assuming power in the courts to review the exercise of his quasi judicial power in refusing such approval, it still must be held that as applied to the present case this regulation is not valid in so far as it might be construed to abrogate section 7 of the customs regulation act in the present case.

The decision of the circuit court, which affirmed the decision of the Board of General Appraisers, is affirmed.

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CARTER v. UNITED STATES (No. 70).<sup>1</sup>

1. COTTON CLOTHS—ETAMINES.

Where the importer protests against the rate assessed on his importation and points out the provisions of law under which he contends the articles in question are properly dutiable and indicates these with sufficient clearness for the collector by mere computation or examination of the goods to determine their classification, he has in all essential respects complied with section 14 of the customs administrative act of 1890 relative to protests of a collector's decision.

2. "REASONS" AND "GROUNDS."

The substitution of the word "reasons" for "grounds" in the customs administrative act of June 10, 1890, held not to exact a more specific protest than formerly on the part of the importer (declining to follow *Hygienic Wood Wool*, T. D. 27328); *Boker v. United States* (T. D. 25892, 140 Fed. Rep., 115) distinguished.

United States Court of Customs Appeals, October 28, 1910.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 29389).  
[Reversed.]

*Walden & Webster* for the appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers overruling the importer's protest on the ground that it does not set forth distinctly and specifically the reasons for his objection to the collector's decision, as required by section 14 of the act of June 10, 1890.

The merchandise in question was classified as etamines, which are covered *eo nomine* by section 339 of the tariff act of 1897.

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<sup>1</sup> Reported in T. D. 31033 (19 Treas. Dec., 1116).

### The protest claimed:

The merchandise is dutiable at the appropriate rate according to count of threads, weight, value, and condition as cotton cloth under paragraphs 304 to 310, inclusive, or at the same rate and the additional rate according to value under paragraph 313, or at 45 per cent under paragraph 322 or 347, or at 35 per cent or at other appropriate rates according to count, etc., under paragraph 346; if dutiable under paragraph 313, the ad valorem rates under 304 to 310, inclusive, are not applicable, but the duty under paragraph 313 should be added to the specific rates only or at the appropriate rate and under the proper paragraph according to the component material of chief value.

This protest was held insufficient on the ground that the protest mentioned no rate, merely claiming the merchandise to be dutiable "at the appropriate rate according to count of threads, weight, value, and condition as cotton cloth under paragraphs 304 to 310, inclusive," and under paragraph 313.

This holding of the board presents the sole question for our consideration, the board having found that the cloths were in part dutiable at 25 per cent ad valorem under paragraph 305 and in part dutiable at the same rate and an addition of 2 cents per square yard under paragraph 313.

The requirement of section 14 of the customs administrative act of June 10, 1890, is that the importer, if dissatisfied with the decision of the collector, shall give notice to the collector, in writing, setting forth therein distinctly and specifically and in respect to each entry or payment the reasons for his objection thereto.

The question has been raised as to whether the decisions under the prior statute, section 2931 of the Revised Statutes, are to be given full force in view of a change in the phraseology in the act of June 10, 1890. Under the former statute the importer was required to give notice in writing to the collector if dissatisfied with the decision, setting forth therein distinctly and specifically the grounds of his objections thereto. It will be noticed that in the later act the word "reasons" is substituted for "grounds," and the Board of General Appraisers in the matter of Hygienic Wood Wool, G. A. 6360 (T. D. 27328), in an elaborate and well-considered opinion, reached a conclusion upon what we regard as somewhat refined reasoning that the change of this word indicated a purpose to require a more specific protest. We are not able to accept this view. Among the definitions of the word "ground" appearing in the New English Dictionary (Vol. IV, 550) is "(c). A circumstance on which an opinion, inference, argument, statement or claim is founded, or which has given rise to an action, procedure, or mental feeling; a reason, motive." It is quite clear, we think, that the word "reasons" was used in the later statute in the same sense that the word "grounds" was used in the former. In either case, certainty to a common intent is all that is required, and where a statute required the Attorney General in filing an information to set

forth briefly and without technical terms the grounds on which a forfeiture was alleged to have been incurred, it was held that by requiring the grounds to be set forth nothing less should be meant than that the facts and circumstances should be set forth. *Attorney General v. R. R. Co.* (28 N. C., 456); s. c. *Words and Phrases Judicially Defined*, 3176.

The cases which have arisen under the two statutes are therefore all pertinent. It would be needless to attempt to reconcile all the decisions, but we think there can be gleaned from the authoritative decisions of the Supreme Court a rule which will be sufficient for the determination of this case.

In the case of *Converse v. Burgess* (18 How., 413) the fact was noted that the statute was designed for practical use by men engaged in active commercial pursuits. The court said:

We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his design to make it the foundation of a claim against the Government.

In *Arthur v. Morgan* (112 U. S., 495) *Converse v. Burgess* was cited with approval, and it was said:

A protest \* \* \* is sufficient, if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure.

It was accordingly held that a protest describing the importation, a carriage, as personal effects was sufficient, although the court found the article to be household effects, enumerated in the same subdivision with personal effects.

The cases were again reviewed in *United States v. Salambier* (170 U. S., 621), in which case sweetened chocolate in the form of small cakes or tablets manufactured from cocoa and sweetened with sugar were classified for duty at 50 per cent ad valorem under paragraph 239 as chocolate confectionery. The protest claimed the goods to be dutiable at 2 cents per pound, but failed to state the paragraph under which they were dutiable. There were two paragraphs, 318 reading: "Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate), two cents a pound," and 319, "Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound."

It was said:

It does not appear that the collector deemed the protest insufficient in form or unintelligible. Not complaining of any want of distinctness in the protest, he adhered to his decision as to the nature of the merchandise and the amount of the duty, and, in pursuance of the statute, transmitted the protest with the invoice and entry to the Board of General Appraisers. \* \* \*

We have no difficulty in agreeing with the Board of Appraisers and with the circuit court that the protest was, in form and substance, a reasonable compliance with the law. \* \* \* The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely, paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, 2 cents per pound.

This case was cited in the Circuit Court of Appeals, Seventh Circuit, in *United States v. Shea, Smith & Co.* (114 Fed. Rep., p. 38), which case held that a protest was sufficient although it named paragraph 425 as the paragraph under which the articles were dutiable, whereas the court found that they were dutiable under paragraph 422.

In the case of *In re Claffin et al.* (113 Fed. Rep., 944) the collector assessed the goods in question as lambskin, dutiable at \$2.50 per dozen pairs, under paragraph 441, and 40 cents additional under paragraph 445 of the tariff act of 1897. The importer protested against the rate of \$2.90 per dozen pairs, and claimed that they should have been assessed under Schedule N, paragraph 439, as Schmaschen gloves, dutiable at \$2.15 per dozen. Section 439 did not itself fix the duty on gloves, but was extended to include section 440, where the two sections were clearly to be read together. Section 440 provided for varying rates of duty, depending upon the length of the glove and upon whether they were intended for women, children, or men. The court held that this protest was sufficient, on the authority of the *United States v. Salambier*.

In the case of *Hensel v. United States* (160 Fed. Rep., 219) the merchandise was assessed as lithographic prints at 25 per cent ad valorem. The protest read:

Said merchandise is not dutiable as assessed. It is otherwise more aptly and specifically provided for. It is covered by and is dutiable under paragraph 400 at the rate or rates therein provided, according to thickness, cutting, size, etc.

The court said:

The sample shows the merchandise to be lithographic prints. It shows the material of which it is composed. The character of the print, the size and thickness, are readily ascertainable from the sample. It is not necessary that the protest should describe the sample, as the collector has that before him, but must distinctly and specifically state the reasons for the protest. This protest calls the collector's attention to his error in fixing the duty under the wrong paragraph. It points out the correct paragraph, and that the duty should be assessed under the provisions of that paragraph relating to lithographic prints or pictorial post cards, and that portion of the paragraph which is applicable to the post cards in question according to the dimensions of the sample in hand.

The court overruled the Board of General Appraisers and sustained the protest.

It is not easy to distinguish that case from the present. It is true that that was a decision of the circuit court, but the reasoning commends itself. In the present case it is true a number of paragraphs

are named in the protest, but all relate to the same subject, to wit, cotton cloth. The means of ascertaining the rate of duty are in the hands of the collector. He has but to examine the goods and make the count of threads, which we understand is customary in any case in order to determine the rate of duty. The real matter of difference between the importer and the collector was that the latter assumed the goods to be etamines, whereas the importer claimed that they were dutiable as cotton cloths at the rate to be determined by the collector himself. To require that the importer should, at his peril, state the number of threads to the square inch when his statement would not be in any way controlling upon the collector would be not to give a liberal or reasonable construction to the statute, but to set a trap for the unwary and perhaps lead to nullifying his protest because of overparticularity.

A case which has given rise to much misunderstanding and perhaps had led the courts and the board in some instances to depart from the correct rule is that of *Boker v. United States*, G. A. 5899 (T. D. 25892), affirmed on appeal by the circuit court in 140 Fed. Rep., 115; and again affirmed by the circuit court of appeals without opinion (145 Fed. Rep., 1022).

In that case the goods were assessed under paragraph 137 of the tariff act of 1897, which imposed varying duties upon steel wire of different sizes and finish, with a proviso that if it was valued at more than 4 cents per pound the importer should pay 40 per cent ad valorem, and also provided for iron or steel or other wire not specially provided for in the act a rate of duty of 45 per cent ad valorem. According to the report of the case, the only claim set up in the protests reads as follows:

We claim that said goods are properly dutiable under the provision of paragraph 137 of the tariff act of July 24, 1897.

The protests named no rate of duty other than that assessed, nor did they set forth any fact which would guide the collector in determining what was claimed. It will be noted that the duties were assessed under the same section invoked by the protestants. The board said, speaking through General Appraiser Fischer:

The protests are faulty, in that if they were sustained in the terms of the protests themselves the importers would obtain no relief, for no reliquidation would be thereby necessitated.

This case appears to be relied upon as authority for the proposition that a citation to a section in the statute which provides for varying duties according to weight, measure, or quality is insufficient. The case does not so decide.

In *Lothrop v. United States* (164 Fed. Rep., 99) a protest was under consideration which recited that the duty should only be paid under



the first section of paragraph 137. The Board of General Appraisers said:

There are no less than three different rates of duty prescribed in the first section. Such a protest does not apprise the collector of just what the importer's claim is.

and held the protest insufficient. But, on appeal, the circuit court held that the protest was sufficient. It is very clear that the holding of the Board of General Appraisers was not in harmony with *Hensel v. United States*, nor, as we construe it, with *United States v. Salambier*.

If the purpose of this notice is to apprise the collector of what the claim of the importer is, and if technical nicety is not to be insisted upon, we think that where the importer protests against the rate assessed and at the same time points out provisions under which he claims the article to be dutiable with sufficient clearness so that the collector may by mere computation or examination of the goods determine their classification, he has complied with the statute in all essential respects.

We think in this case the objections were made sufficiently clear, and that the decision of the Board of General Appraisers should be reversed.

DE VRIES, Associate Judge, being disqualified, took no part in the hearing or decision of this case.

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GALLAGHER v. UNITED STATES (No. 247).<sup>1</sup>

ENTRY SOUGHT TO BE MADE AFTER OFFICE HOURS.

In June, 1909, certain liquors were withdrawn from warehouse at the port of New York, transported to Chicago, and entered for warehouse there July 29 following. On August 5 following, at about 5.30 o'clock p. m., the owners sought to withdraw these liquors, paying duty as of that date. *Held*, the collector properly refused the duties so tendered after office hours and properly, on August 6 ensuing, assessed the duties under the tariff act, August 5, 1909, effective that day.

United States Court of Customs Appeals, October 28, 1910.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23266 (T. D. 30601).

Affirmed.

*Lester C. Childs* for appellant.

*D. Frank Lloyd*, Assistant Attorney-General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

In June, 1909, Gallagher & Ascher, the appellants here, imported certain liquors into New York. The goods were withdrawn from warehouse at the port of New York and transported to Chicago and

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<sup>1</sup> Reported in T. D. 31034, (19 Treas. Dec., 1121).

there entered for warehouse July 29, 1909. Entry was made for rewarehouse under a rewarehousing entry of July 29, 1909.

On August 5, 1909, at about 5.30 o'clock in the evening, a withdrawal entry for consumption, with duties due thereon, was tendered to a deputy collector of the entry and warehouse department of the Chicago customhouse. The deputy collector refused the offer. On August 6 payment, entry, and withdrawal were actually made under the tariff law of August 5, 1909.

It is admitted that the tariff law of August 5, 1909, went into effect, except where specially provided therein, on the day following its passage—that is, on August 6, 1909. The importers contend, however, that the transaction at the customhouse on the evening of August 5 was equivalent to a regular withdrawal entry and payment of duty on that date, and that therefore the act of 1909 had no application, and that duties should have been assessed under the tariff act of 1897. The Board of General Appraisers approved the refusal of the collector to accept the tender, basing their decision on the ground that the importers were too late in making their tender and entry, and that therefore they could not avail themselves of the provisions of the tariff law of 1897. From the decision of the board the importers have appealed to this court.

Gathering the facts from the testimony, it appears that Mr. J. M. Gallagher, of the firm of Gallagher & Ascher, prepared a withdrawal entry so as to have it ready for payment on August 5, "so that if there was any urgency everything would be ready." Mr. Gallagher says that he left his office at about 5.15 o'clock in the afternoon of August 5, taking with him the money for the payment of the duties; that at about 5.30 o'clock he found the door to the office of the customhouse was open, and that he went in and found a deputy collector in his office; that Mr. Ford, who was with the appellant, made a tender to the deputy collector, who replied that he could not accept it, that he had waited as long as he could, but that appellants were just a little too late. The cashier, who is ordinarily the proper person to receive the money paid for duties, was not in the customhouse when the appellants made the tender to the deputy collector, and there were only a few of the entry clerks still there.

On August 6, as hereinbefore stated, entries were made, and duty was assessed under the tariff act of 1909.

Under the facts as stated, the question for determination is whether or not the Board of Appraisers was correct in deciding that the tariff act of 1909 controlled the importation made by the appellants.

The basis of the argument of the appellants is that the tender by the importers was made on August 5 to the proper officer at his proper place of business, and during a business day, at a time when such office was still open to the public. Inasmuch as counsel for the Gov-

ernment admits that if tender of entry and payment were made at the proper time, to the proper person, appellants will be entitled to have the duties assessed under the law of 1897, the case is freed of any narrower question of the form of the tender made by the importers, and we can proceed to the merits under the facts.

Acting under the authority conferred by Revised Statutes, 1878, section 251, the Secretary of the Treasury established the following rule for the hours of business at the various customs offices:

ART. 1389. (Customs Regulations of 1908.) *Hours of business.*—Customs offices shall be kept open for business on all days of the year, except Sundays, Independence, Christmas, and New Year's Days and such other days as may be designated by law, or by the President of the United States, or by the Secretary of the Treasury, between the hours of 9 a. m. and 4.30 p. m., and these hours are to be prolonged when the necessities or interests of the public service require it.

The hours fixed by this regulation are wholly reasonable. Common knowledge of the usual way in which business affairs are conducted tells us that the regulation accords with the ordinary convenience of merchants in their daily transactions; hence we conclude that appellants have no ground for complaint against the collector in refusing their tender at 5.30 o'clock on August 5, unless the customhouse was actually opened for business when the tender was made and refused, or unless, on August 5, 1909, the situation became such that there arose a necessity of the public service which made it the duty of the collector to have prolonged the hours of business until 5.30 o'clock.

Upon the first point, however, the evidence is that when Mr. Gallagher went into the customhouse the cashier and most of the entry clerks had gone, and that the office was not open for the general transaction of business, and that it was not meant that it should be. The mere fact that Mr. Gallagher could enter, and that there was a deputy collector and several clerks in the office when he went in, signifies very little. For all that appears the door may have been left open for temporary convenience, and the few officials there may have remained to close up the business of the day, or may have tarried for their mere personal accommodation.

It does not appear that there were any other importers transacting business when these appellants went in; nor is there anything which tends to show directly or indirectly the slightest disposition or effort on the part of the officials to wrong or to embarrass the appellants. It may have been unfortunate for the importers, under all the circumstances, that the tariff law of 1909 was not signed until five minutes after 5 o'clock on the day they made their tender; but it would seem not inappropriate to suggest that the possibility of a sudden change in the law might well have been considered by them before such a thing actually did occur, so that even the argument of hardship does not appeal with real force.

Taking up next the contention that the circumstances of the times—the enactment of a new tariff law at 5.05 p. m. August 5, to be operative the next day—created a public necessity and that the interests of the public service required the prolonging of the hours after 4.30 o'clock on that day, and we are easily led to a conclusion adverse to the importers. The law is its own best expositor and should be examined in its entirety to arrive at the intention of the Congress which enacted it. *Pennington v. Cox* (2 Cranch, 33).

The first objects of the statute, as stated in its title, were to provide revenue, equalize duties, and encourage the industries of the United States. Just when the act as passed by Congress should become effective was a question for the consideration of the legislative branch of the Government. The words of the act, in unmistakable expressions, provided that unless it was otherwise specially provided by the law the act should take effect "on the day following its passage" (sec. 42). Though this provision was prospective, it was in a general way wholly specific. But further: Congress with knowledge that there would be many instances where goods that had been previously imported for which no entry had been made, and that there must be many instances where goods had been entered without payment of duty and under bond for warehousing or any other purpose, for which no permits had been issued, presumably realizing, too, that confusion would follow unless explicit provisions were made to cover such cases, deliberately emphasized their generally expressed determination that the act should be in effect on the day after its passage, by providing (sec. 29) as follows:

SEC. 29. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: \* \* \*

In the light of these several mandatory clauses, covering previous as well as subsequent importations, how can it now be urged that the necessities or interests of the public service required the collector to keep the customhouse open after half past 4 o'clock on August 5? From the standpoint of the public service, there was no need that importers who had not moved to enter their goods before the close of usual business hours on August 5, 1909, should be allowed to make entries after such usual office hours had passed; nor can the courts say that the circumstances were of such a character as that "interests of the public service" required the collector to have remained on duty until half past 5, in anticipation that Congress might enact a new tariff

law which might affect entries of certain goods then in warehouses. The public interests are what is expressed by statute adopted by Congress, and where in a statute so adopted and so explicit as the one under examination there is not only no exception in favor of importers situated as were these appellants, but a positive requirement that their goods were liable to duty under the new law, the courts can give no consideration to suggestions that it was the duty of officials to do unusual acts which would have been out of harmony with the plain import of the law.

These views lead to the conclusions that the collector's office was not open for business when the tender of the appellants was made, that neither necessity nor interest of the public service made it obligatory upon the collector to prolong his office hours until 5.30 on that day, and that the goods became dutiable under the tariff act of 1909.

The decision of the Board of Appraisers is therefore *affirmed*.

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UNITED STATES v. McCONNELL (No. 2).<sup>1</sup>

FIGURED COTTONS WITH CORD ORNAMENTATION.

The merchandise was a cotton cloth, commonly called striped or madras shirting, so woven that ordinary warp threads are grouped together and covered with another longer warp thread on the face of the fabric and presenting a raised rounded appearance, forming thereby, in effect only, a so-called Russian cord. Irrespective of what it resembles, this cloth is not dutiable under paragraph 323, tariff act of 1909, imposing a cumulative duty, but under paragraph 320 of that act, in connection with paragraph 318.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7000 (T. D. 30467).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

*Brooks & Brooks* (*Frederick W. Brooks, jr.*, on the brief) for appellees.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation is cotton cloth, commonly called striped or madras shirting.

Upon the two samples before us there are various stripes at uniform distances from each other and of a color different from the ground-work of the fabric. Each of these stripes is composed wholly or in part of what is called a Russian cord. On one of the two samples some of these Russian cords are of the same color as the main body of the cloth.

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<sup>1</sup> Reported in T. D. 31104 (19 Treas. Dec., 1211).

This so-called Russian cord upon the goods before us is produced in weaving by grouping several, in some instances eight, regular warp threads in one reed and in the weaving treating them substantially as one thread. They are woven in connection with another longer warp thread of the same color called a leno thread and in such a manner that the leno thread passes from side to side of the grouped threads on the face of the cloth only, interweaving alternately with the weft threads on either side of the grouped threads in such a manner that the weft threads do not pass in front of the grouped threads. This results that these grouped warp threads and the leno thread when the weaving is completed present a rounded raised appearance, resembling a cord, upon the face of the fabric.

By this operation the weft threads all remain underneath or back of the grouped threads, and the color of the weft threads therefore does not show on the face of the cloth at this point. The leno thread shows on the back of or underneath the fabric, but the cord effect does not appear there.

It is apparent that the Russian cord is not a cord in fact, but merely a cord effect, and there is no question made but that one of its purposes is to give the goods a fancy or figure effect.

These cord effects extend the whole length of the web, and when woven there are no loose or floating threads to be trimmed off as is usually the case when lappets, dots, or swisses are made upon the fabrics in the process of weaving.

The merchandise in question was assessed for duty under the countable provisions of paragraph 318 of the tariff act of August 5, 1909, and an additional duty of 2 cents per square yard was assessed under paragraph 323 of the same act. To the imposition of this additional duty the importers protested; the Board of General Appraisers sustained the protest and, on petition of the collector of the port of New York, allowed a rehearing during which additional evidence was taken by the Government. At its conclusion the board adhered to its original decision and the case is brought here for review.

The material portions of paragraph 323 are as follows:

In addition to the duty or duties imposed upon cotton cloth by the various provisions of this section, there shall be paid the following cumulative duties, \* \* \*. On all cotton cloth in which other than the ordinary warp and filling threads are used to form a figure or fancy effect, whether known as lappets or otherwise. \* \* \*

This statute, in substance, appears to have been first enacted in paragraph 313 of the tariff act of July, 1897, in the following language:

Cotton cloth, in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, \* \* \*.

So far as applicable to the importations in question, we think that section 323 of the tariff act of 1909 did not change the law as enacted in paragraph 313 of the tariff act of 1897.

The importers claim that the provisions of paragraph 320 of the tariff act of 1909, which is as follows:

The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or cut in lengths, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practical means, \* \* \*

in connection with the provisions of what may be called the countable paragraph, 318 of the act, furnish the rules for the assessment of duty, and that paragraph 323 is inapplicable.

The question, therefore, is whether this madras shirting is a figured or fancy cloth which is not embraced in paragraph 320 because otherwise specially provided for in paragraph 323. That it is fancy or figured cloth is not questioned, and it is not claimed to be lappets. Is it cloth in which other than the ordinary warp or filling threads are used to form a figure or fancy effect?

Both sides rely amongst other things upon the authority of *H. B. Claflin Co. v. United States* (109 Fed. Rep., 562) and *Mills et al. v. United States* (109 Fed. Rep., 564), which were affirmed in the Circuit Court of Appeals for the Second Circuit in 114 Fed. Rep., at pages 259 and 257, respectively, to support their contention. In each of these cases the merchandise was by the courts held dutiable under paragraph 313 of the tariff act of 1897.

In the *Claflin* case the madras goods, which were the only ones at all similar to the importations before us, were ornamented with dots or figures woven by independent weft or filling threads introduced in weaving for the purpose, portions of which were afterwards cut away.

In the *Mills* case the goods were described as lenos. By referring to the decision of the Board of General Appraisers (T. D. 22604) it will be found that out of 17 exhibits each piece, with one exception which will be herein later referred to, was so woven that the ornamentations giving the figure or fancy effect were either lappets or figures or designs produced by the introduction of threads loosely attached to the groundwork of the fabric, in some instances leaving threads to be cut off and some not; in no case, as we understand the decision of the board, save the exception above mentioned, do these threads become a part of the groundwork of the woven fabric; and the board found as a fact that they were introduced primarily for the purposes of ornamentation.

With reference to the exception above referred to, it appears from the decision of the board that this cloth was of white groundwork,

checked with pink warp and filling threads, so manipulated in the weaving as to be thrown mostly upon the surface of the fabric, and that these threads extend the entire length or width, as the case may be, of the web and were not clipped off.

The Board of General Appraisers sustained the protest as to this sample and held that it was not liable to the cumulative duty provided under paragraph 313 of the tariff act of 1897, because such pink threads "occupy the place of regular warp and filling threads, are not additional thereto, and the fabric would not be perfect if they had not been put in."

The importers appealed from the decision of the board so far as it related to the other samples, but the Government did not appeal from that part of it sustaining the protest.

As we understand the decisions of the courts in the cases referred to, considered in the light of the facts before them, although there are isolated remarks that may seem to sustain the contention of both sides before us, they are to the effect that where ornamentations resulting in figure or fancy effects are produced by lappets, dots, or swisses, superimposed by weaving upon the groundwork of the fabric, or where such figures or fancy effects are produced by means of threads introduced in the process of weaving solely for such purpose and designed to be either clipped off or left loose upon the fabric itself, such ornamentation brings the cloth within the provisions of paragraph 313 of the tariff act of 1897; but when thread or threads introduced in or during the process of weaving enter into the structural formation of the goods, although one of the purposes served by them is to produce an ornamental appearance, such threads are not other than ordinary warp or weft threads within the meaning of the paragraph.

It is claimed by the appellant, and some evidence taken before the Board of General Appraisers tends to show, that these warp threads bound together by the leno thread may all but one be removed from the fabric and still the corded effect retained and that all such threads and the leno thread can be removed without impairing the integrity of the cloth itself. While this process of dissection may be of some aid in determining the part which each thread plays in the construction of the fabric, yet it is not conclusive upon the question as to the purpose of the introduction of any thread in weaving, and we do not agree with the Government's contention that this leno thread and the other warp threads it helps hold together can be removed without materially impairing the integrity of the cloth.

It is obvious, and an inspection of the samples clearly shows, that such removal leaves relatively large-sized unfilled spaces in the fabric,



and, we think, materially injures the same not only in its appearance, but also in its integrity.

What is an ordinary warp or filling thread in any fabric must necessarily depend upon the facts that appear with reference thereto. A thread or threads may undoubtedly be introduced in the process of weaving in such a manner that although they produce a figure or fancy effect they are, nevertheless, ordinary warp or filling threads in the manufacture of that particular piece of goods.

Under paragraph 320 of the tariff act of 1909 the importer has a right to bring in free of cumulative duty figured or fancy cotton cloth if the figure or fancy effect is produced by the ordinary warp or filling threads so that the existence of a figure or fancy effect in the cloth is not conclusive; the test being, Is it produced by other than the ordinary warp or filling threads?

In the case before us the leno thread extends the entire length of the web and it is closely woven into the same. One of its purposes is to produce a corded figure or fancy effect. We think that this thread of itself is an ordinary warp thread used in the weaving of goods manufactured as these samples are. It also aids to produce the solid color effect of the cord and contributes largely to the part the other grouped warp threads play in producing the same effect; they are held in place by it and each and both are integral parts of the fabric when completed and neither can be removed without affecting its integrity. It is true that one of the grouped threads may be removed with no great detrimental effect upon the fabric; so, perhaps, may any isolated warp thread, but, nevertheless, it holds true that the removal of any one of the bases upon which a fabric is constructed affects to a greater or less extent its structural integrity; and the bases composing a woven fabric necessarily must be its warp and weft threads.

This case is vastly different, as we view it, from those where the figure or fancy effect is produced by weaving upon the face of the fabric, with independent threads, figures other and different from those produced by any manipulation of the regular warp or weft threads which enter into the structure of the fabric. Manifestly, these last are within paragraph 323.

To the argument that these ornamentations are very similar to those which are known as lappets and that it is therefore clear that the legislative intent must have been that they should pay the same duty, it may be said that the statute does not make that the test. The question is not what they resemble, but how they are produced; and it must appear they are produced by other than the ordinary warp or weft threads to bring them within the paragraph. If Con-

gress intended to impose the cumulative duty upon the effect, regardless of how produced, it failed to use language susceptible of that interpretation. We must apply the law as it is written, and the relief, if any is needed, should be sought from the legislature and not the judiciary.

It appears that early in 1900 the Board of General Appraisers in considering the protests of Wright & Graham (T. D. 21940) passed upon the question of whether madras shirtings, which it is claimed are very like in the process of manufacture to the merchandise before us, held that such goods were not within the provisions of paragraph 313. It appears from the decision of the board that in that case there were two warp threads so manipulated as to produce a cord effect similar to the cord effect upon the importations in this case, although it does not appear, as we understand the decision of the board, that the leno thread was used in the weaving to produce such an effect.

This decision was not appealed from by the Government, and by its letter under date of January 25, 1900, the Treasury Department notified the collector of the port of New York that no appeal would be taken therefrom and directed him to conform to the opinion of the board in assessing merchandise of the character covered by its decision in the Wright & Graham case.

The importers, therefore, urge as a further ground for affirming the decision of the board in this case, and this view evidently obtained with the board, that the well-established principle that a long-continued practice in construing the provisions of law by either the executive or judicial departments of the Government is entitled to great weight in interpreting a statute, and that where, as in this case, the provisions of a previous law have been subsequently reenacted in a subsequent act, the Congress is presumed to have adopted the construction then already placed upon the previous law by such departments, and that it is now too late for the Government to ask and would be unjust for it to obtain such a construction of the act in question as it now asks for.

Many cases are cited in support of this proposition, the latest being *Komada & Co. v. United States* (215 U. S., 392).

We recognize the force of this contention, but in view of our conclusion upon the other feature of the case, as already indicated, do not find it necessary to consider at length this point.

The decision of the Board of General Appraisers is affirmed.

DE VRIES, Judge, having heard the case below, did not participate in its determination here.

LICHTENSTEIN v. UNITED STATES (No. 12). JOHN ZIMMERMAN Co. v. UNITED STATES (No. 13).<sup>1</sup>

BLANKET PROTEST, INSUFFICIENCY OF.

A protest, blanket in form, covering various classes of articles, not included in the importation or importations in question, fails to state the importer's claim with such clearness and certainty as to acquaint the collector with the real grounds of the complaint, and is insufficient. Protests are to be construed liberally and alternative claims are allowable, but the requirement of law that the importer shall set forth in the protest distinctly and specifically and in respect to each entry or payment the reason for his objection thereto may not be ignored.

United States Court of Customs Appeals, November 30, 1910.

TRANSFERRED from the United States Circuit Court of Appeals, Second Circuit, G. A. 6534 (T. D. 27885).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin*, special attorney), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

In these two cases the Board of General Appraisers determined the cases solely upon the ground that the protests filed with the collector were insufficient. On appeal to the circuit court, this holding was affirmed, and the importers bring the cases here for review.

The protests are in all respects similar, and one of them is given at length:

NEW YORK, February 17, 1906.

HON. COLLECTOR OF CUSTOMS, Port of New York:

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision assessing duty at 30 per cent ad valorem or 60 per cent ad valorem, or other rate or rates, on braids, plaits, laces, hats, or other articles, composed wholly or in part of horsehair or of imitation or artificial horsehair, silk, straw, cotton, chip, grass, or other substance, covered by entries below named. The reasons for objection, under the tariff act of July 24, 1897, are as follows: Said merchandise is covered by, and is dutiable under, section 6 at only 20 per cent ad valorem, or paragraph 409 at only 15 per cent ad valorem, or 20 per cent ad valorem (as braids, plaits, laces, sheets, or squares), or at only 25 per cent ad valorem or 50 per cent ad valorem (as hats, bonnets, or hoods). If not dutiable as aforesaid, all of said merchandise is covered by, and is dutiable under, paragraph 430 at only 10 per cent ad valorem, or paragraph 429 at only 20 per cent ad valorem, or paragraph 198 (as wood) at only 20 per cent ad valorem, or paragraph 3 (as chemical compounds) at only 25 per cent ad valorem, or paragraph 431 at only 10 cents per square yard or only 20 cents per square yard, or paragraph 258 at only \$1.50 per ton, or paragraph 323 at only \$5 per ton. Such of said merchandise as has been assessed for duty at more than 30 per cent ad valorem, if not dutiable as aforesaid, is covered by, and is dutiable under, paragraph 449 (as manufactures of chip, grass, palm leaf, straw, weeds, etc., or of which these substances or either of them is the component of chief value) at only 30 per cent ad valorem, or paragraph 450 (as

<sup>1</sup> Reported in T. D. 31105 (19 Treas. Dec., 1217).

manufactures of human hair or other substance therein named, or of which these substances or either of them is the component of chief value) at only 35 per cent ad valorem, or paragraph 208 (as manufactures) at only 35 per cent ad valorem, or paragraph 453 at only 35 per cent ad valorem, or the last part of paragraph 346 at only 35 per cent ad valorem, or paragraph 347 at only 15 per cent ad valorem, or paragraph 320 (as tapes, webs, webbing, or other article therein named) at only 45 per cent ad valorem, or paragraph 322 at only 45 per cent ad valorem, or paragraph 314 (as clothing or articles of wearing apparel) at only 50 per cent ad valorem, or paragraph 359 (as bandings, hatbands, webs, webbings, or other articles therein named) at only 50 per cent ad valorem, or paragraph 391 (as manufactures) at only 50 per cent ad valorem. Such of the merchandise covered by this protest as has been assessed with more duty than would accrue upon it under the remaining paragraphs herein mentioned, if not dutiable as aforesaid, is covered by, and is dutiable under, the first part or proviso of paragraph 346 at the rate or rates therein provided according to weight, count, etc., or paragraph 17 at only 50 cents per pound, or only 60 cents per pound, or only 65 cents per pound and 25 cents ad valorem, or paragraph 432 as therein provided according to value, or paragraph 302 as therein provided according to number, etc. All of the merchandise covered by this protest is either composed in sufficient quantities of the materials required by the paragraphs herein referred to, or else it is nonenumerated articles and subject to sections 6 and 7 because composed wholly or in chief value or in part of horsehair or of imitation or artificial horsehair, silk, straw, cotton, chip, grass, or other substance.

This protest applies to items 8900, 9194, 9236, 9280, 9278, 9271, 9274, and to all other items upon the invoices.

The parts of the law referred to in above claims are the only, or the most apt and specific, ones for said merchandise or articles and should control the classification. The above claims, severally and collectively, are alternatively made under the paragraphs or sections referred to, both directly and by similitude, and component material or otherwise, as provided in section 7, and by the rules as to the ordinary meaning of words, the statutory meaning, commercial designation, meaning or usage, controlling force of chief use and chief component in value, and by all statutory, judicial, or other rules for the construction of the law; hereby reserving all questions of law and fact. This protest is intended to apply to all merchandise or articles included in the entries and importations referred to herein, and to each and all future importations of the same or similar merchandise or articles, and to the payments thereon. The entry numbers and other marks, numbers, and data, below given, are given under duress, without prejudice, to aid you, and not to limit this protest. The excess is paid under compulsion, to obtain and retain possession of said merchandise or articles, and you and the Government are held liable for the same, and a demand for the payment thereof, and for a readjustment or liquidation of the entries in accordance with the above claims, is hereby made.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions herein.

Entry No. 246573; vessel, *Kroonland*; entered, November 9, 1905; bond No. G.; liquidated, February 14, 1906; marks and Nos., H. F. & Co., 707, S 437, B 3169/71; and various as per entries and invoices.

Respectfully,

JOHN ZIMMERMAN CO.,

By JOHN FRANCIS STRAUSS, Attorney,

27 William Street, New York City.

EVERITT BROWN, Counsel.

We have recently had occasion to consider section 14 of the customs administrative act of June 10, 1890, in the case of *Carter v. United*

States (T. D. 31033), *supra*, p. 64. That case contains a review of the decisions and a statement of our views as to the essentials of a valid protest. In addition to that authority, it may be stated that the courts have established the rule, which we think entirely sound, that a protest may be in the alternative and point out more than one provision of the tariff act under which it is claimed that the importation may be dutiable. *Koechl v. United States* (91 Fed. Rep., 110), *Legg v. Hedden* (37 Fed. Rep., 861), *In re Downing et al.* (45 Fed. Rep., 412), and *Blumenthal v. United States* (72 Fed. Rep., 48).

These cases present, however, a somewhat different question. While a protest should be construed liberally, and while alternative claims are allowed, yet there is the requirement which can not be ignored contained in the words of the section involved that "the importer shall set forth in the protest distinctly and specifically, and in respect to each entry or payment, the reason for his objections thereto." The uncertainty in the present case, if any, arises out of the fact that a blanket form of protest was employed. It was to cover, in the language of the protest, a decision of the collector in assessing duty "at 30 per cent ad valorem or 60 per cent ad valorem, or other rate or rates, on braids, plaits, laces, hats, or other articles, composed wholly or in part of horsehair or of imitation or artificial horsehair, silk, straw, cotton, chip, grass, or other substance; covered by entries below named."

In the several importations in which these protests were used there were included not all the classes of goods enumerated, each importation including but one or two classes of goods, with the result that the main and alternative grounds named in the protest were incongruous. Sections of the statute in no way affecting the importation in question were enumerated, and the burden was imposed upon the collector of picking out in each case which of the goods enumerated in the protest were actually contained in the importation. But more than this, as the protest contained a large number of claims that were pertinent only to some other classes of goods, involving some other importation, it imposed the burden upon the collector of going through the entire claim in the list to ascertain what was in the mind of the protestant in filing his protest, and by a process of exclusion of undertaking to ascertain the real claim put forth. This is far from being specific. As was said by the board:

It does not seem that there is such a correlation between horsehair braids and hats and curled hair for mattresses, chemical compounds, sheets of collodion, straw or flax straw dutiable by the ton, sawed planks of cabinet wood, manufactures of fur, gelatin, ivory, shell, etc., and indurated fiber ware or manufactures of wood pulp as to require any judicial construction in the matter.

It is not essential that the importer shall in the protest "hit the bird in the eye." But it is essential that he state his claim with such

reasonable clearness and certainty as to acquaint the collector with the real ground of his complaint. This protest is misleading rather than informing. This obscurity results from a pernicious method of attempting to throw upon the collector and the courts the burden which properly rests upon the protestant of fairly apprising the collector and the court of *real* claims as distinguished from possible claims, which might be appropriately made with reference to goods not involved in the importation in question.

The decision of the Board of General Appraisers and of the circuit court is affirmed.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

### ROTOGRAPH CO. v. UNITED STATES (No. 27).<sup>1</sup>

#### 1. PICTORIAL POST CARDS.

Gelatin prints produced by the lichtdruck process were not dutiable under paragraph 403, tariff act 1897, but under paragraph 400 of that act.—*Carter v. United States* (T. D. 31033), *supra*, p. 64, reaffirmed as to sufficiency of protest.

#### 2. DICTIONARIES AND TREATISES.

When the language of a revenue law would indicate that certain words had been employed by the Congress because the processes of a particular art were changing processes, dictionaries and treatises may be referred to for the purpose of showing the state of that art.

United States Court of Customs Appeals, November 30, 1910.

TRANSFERRED from the United States Circuit Court for Southern District of New York, G. A. 6587 (T. D. 28158).

[Reversed.]

*Comstock & Washburn* (Geo. T. Puckhafer on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in controversy consists of pictorial post cards assessed for duty at 25 per cent ad valorem, as printed matter not specially provided for under paragraph 403 of the act of 1897, reading:

Books of all kinds, including blank books and pamphlets, and engravings bound or unbound, photographs, etchings, maps, charts, music in books or sheets, and printed matter, all the foregoing not specially provided for in this act, twenty-five per centum ad valorem.

The importer claimed that the merchandise was specifically provided for by paragraph 400, which imposes a duty varying according to the thickness of the paper and other conditions named in the paragraph upon "lithographic prints from stone, zinc, aluminum, or other material, bound or unbound."

<sup>1</sup> Reported in T. D. 31106 (19 Treas. Dec., 1220).

The articles in question are produced by coating a piece of plate glass with specially prepared gelatin. This gelatin is then exposed beneath a photographic negative intended to be printed. The light penetrating through this photographic negative acts upon the gelatin, dependent upon the density of the different portions of the negative. The result is that the gelatin is hardened in certain portions and is left soft in others. After that it is subjected to a water and acid bath. Wherever the light has failed to harden the gelatin, it has the property of absorbing or retaining the ink and such portions as have been hardened reject the ink. The gelatin is then put in a lithographic press and the prints are made therefrom. The process is chemical printing as distinguished from printing from type or raised surfaces, such as ordinary printing.

On the hearing before the board it was claimed that the protest was insufficient. The board agreed with the Government's contention in this respect, but also considered the merits of the protest, and held that the position of the importer was not tenable. From this decision of the board an appeal was taken to the Circuit Court for the Southern District of New York and the case subsequently transferred to this court.

The protest, so far as it is pertinent, is as follows:

Notice of dissatisfaction is hereby given with and protest is hereby made against your ascertainment and liquidation of duties and your decision assessing duty at 25 per cent ad valorem or other rates or rates on lithographic prints or other merchandise covered by entries below named. The reasons for objection, under the tariff act of July 24, 1897, are as follows:

Said merchandise is not dutiable as assessed. It is otherwise more aptly and specifically provided for. It is covered by and is dutiable under paragraph 400 at the rate or rates therein provided, according to thickness, cutting, size, etc.

The board, in sustaining the objection to the protest, said, in its opinion:

Paragraph 400, upon which appellants rely, is very long. It provided for many different classes of goods and prescribes no less than 11 different rates of duty as applicable thereto. Yet the protests do not mention which of these many rates of duty is claimed nor do they give any description whatever of the merchandise. In other words, they fail utterly to show that the objection taken at the trial was in the mind of the importers when the protest was filed, and they are likewise wholly insufficient to notify the collector of the true nature and character of the objection the importers might have entertained, so as to enable him to rectify any error that may have occurred in the classification of the goods.

We think the question is ruled by the recent decision of this court in *Carter v. United States*, *supra*, p. 64 (T. D. 31033), in which case it was held that—

Where the importer protests against the rate assessed, and at the same time points out provisions under which he claims the article to be dutiable with sufficient clearness so that the collector may by mere computation or examination of the goods determine their classification, he has complied with the statute in all essential respects.

In the present case all that was required to apprise the collector of the precise rate of duty claimed by the importer was an inspection of the postal cards and an examination of their thickness, etc. That case rules the present. See also *Buehne Steel Wool Co. v. United States* (159 Fed. Rep., 107; T. D. 27536).

The question is then presented whether the goods imported are lithographic prints within the meaning of the tariff law. The testimony of witnesses in the case fails to support the contention of the importer. But it may be said that they were witnesses who were speaking of the lithographic process as originally known and understood. For instance, one of the witnesses was of the opinion that lithography is limited to printing from stone. He was asked:

Q. What do you understand by the word "lithography"?—A. Well, lithography is printing from stone.

Q. And you get that how?—A. Like the word "litho," means stone.

Q. And when you use the word "lithography" you have reference to it in that sense?—A. Yes.

The witnesses for the Government gave similar testimony, but each recognized in the process employed in printing the cards under consideration, namely, the *lichtdruck* process, or the *Albertype* process, many of the characteristics of lithography, among which are that it is a surface printing process; that the lithographic press is used as distinguished from the roller press; that the process of printing in the *lichtdruck* process is similar to that used in the lithographic, in that a dampener is used and water applied, and in the sense that the soft portions of the gelatin attract ink as the fatty surface of the stone attracts ink. The point of difference between the two processes is that in case of the use of a stone the design must be drawn or etched upon the material from which the print is to be made, and the question is whether this distinction, in view of the history of the tariff acts and in view of the knowledge which Congress must be presumed to have had of the development of the art, should be held to differentiate the present products of the lithographic press from those produced by the old method.

The tariff act of 1890 recognized a departure from the original meaning of the word "lithography" by providing for "lithographs printed on zinc as well as stone," the language of the act being, "Lithographic prints from either stone or zinc." This language was continued in the tariff act of 1894, paragraph 308. In 1897, however, in the paragraph in question, 400, the language employed is "lithographic prints from stone, zinc, aluminum, or other material, bound or unbound." It is manifest that Congress was keeping pace with the progress of the art, and we think it may be assumed that the Members of Congress were acquainted with the progress of the art, as evidenced by standard authorities upon the subject, particularly



lexicographers. We find in the Century Dictionary, published before that date, lithography defined as follows:

The art of making a picture, design, or writing upon stone in such a manner that ink-impressions can be taken from the work, and of producing such impressions by a process analogous to ordinary printing. In the first process the stone is prepared by grinding to give it a grained or slightly roughened surface, on which the design is drawn with a lithographic crayon precisely as it is to appear in print, but reversed; or the surface is smoothed, and the design is made with pen or brush in lithographic ink. When the drawing is finished, the stone is etched with dilute nitric acid, and then flooded with nitric-acid and gum-arabic solutions combined. The acid decomposes the soap of the crayon or ink, and leaves the marked surface of the stone in a chemical condition that fits it to absorb fatty inks. The gum water, on the other hand, covers with an adherent film all those parts of the surface of the stone which have been left untouched by the crayon or ink. The stone is then passed on to the printer, who "washes out" the picture with turpentine, after which the image appears faintly defined in white. To print from it an inking roller is now passed over the stone. The wet gummed surface resists the ink and remains clean, while the design takes up the ink and readily gives it back to paper under pressure in the press. \* \* \* The design may be put upon the stone by direct drawing, by transfer from paper or from another stone, by engraving, or by transfer from a photograph. \* \* \* The fourth process is that of transferring a photograph to the stone and is called photolithography (which see).

*Photolithography:* The art of fixing on the surface of a lithographic stone by the agency of the action of light upon bichromated gelatin combined with albumen, and by other manipulations, an image suitable for reproduction in ink by impression in the manner of an ordinary lithograph; also extended to include processes of similar character in which the transfer is not made to stone.

In a work published in 1885 entitled "Color and Color Printing as Applied to Lithography," Chapter XXVI, it is said:

In the Grammar of Lithography we have briefly drawn attention to the Albertype and Heliotype processes, on both of which surfaces of gelatin are employed and printed after the lithographic manner. To a certain extent the gelatin may be said to be a substitute for stone, the printing image being obtained by photography instead of drawing or transferring.

In the Grammar of Lithography, by the same author, it is said:

The art of lithography is based upon a chemical principle—that of the attraction and repulsion of various natural substances, and more especially upon the antagonistic qualities of grease and water, or of those substances which are soluble in water and those soluble in oil.

Reference to works of this character may be had for the purpose of showing the state of the art. See *Brown v. Piper* (91 U. S., 37, 40); *Nix v. Hedden* (149 U. S., 304, 306). In the latter case it was held that the court would take judicial notice of the ordinary meaning of words, and that upon such a question dictionaries are admitted, not as evidence, but as aids to the memory and understanding of the court. It was said by Mr. Justice Swayne, in *Brown v. Piper* (supra):

Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him.

See also *Cushman Paper Box Machine Co. v. Goddard* (95 Fed. Rep., 664). This right or duty of the court to take cognizance of such works as those presented has peculiar force in the present case, as the fact that Congress legislated with reference to the advanced state of the art is manifest from the language of the very act itself. If "lithography" is confined to the ordinary definition, it is "the art of engraving on stone." See Murray's New English Dictionary, title "Lithograph." But obviously the term "lithographic prints," as defined by this statute, is not so restricted, and in an inquiry as to what is meant resort must be had to publications showing the progress of the art of lithography, of which it must be assumed that Congress had knowledge. So far as this record discloses, unless we apply the words "other material" to the gelatin process, these words have no office to fulfill.

We think it should be held that the postal cards in question come within the terms of this paragraph and are dutiable thereunder. The decision of the Board of General Appraisers is reversed.

DE VRIES, Judge, having participated in the decision below, did not sit.

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THOMASS v. UNITED STATES (No. 30).<sup>1</sup>

GLOVES MADE OF CELLULOSE OBTAINED FROM COTTON WASTE.

Gloves made of yarn composed of cellulose filaments obtained from cotton waste by subjecting this to a chemical treatment are not articles of wearing apparel to be classed by similitude as silk, but are to be classed by similitude as wearing apparel, value in chief of cotton or other vegetable fiber, and were dutiable as such under paragraph 314, tariff act 1897.

United States Court of Customs Appeals, November 30, 1910.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6718 (T. D. 28759).

[Reversed.]

*Brooks & Brooks* (F. W. Brooks, jr., on the brief) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker* on the brief),  
for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of United States General Appraisers, and was removed to this court from the United States Circuit Court for the Southern District of New York.

The appellants in 1908 imported certain gloves which were assessed by the collector as dutiable by similitude as wearing apparel made of

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<sup>1</sup> Reported in T. D. 31107 (19 Treas. Dec., 1224).

silk, under paragraph 390 of the act of July 24, 1897, the material part of which is as follows:

390. Laces, \* \* \* and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all the above-named articles made of silk, or of which silk is the component material of chief value, not specially provided for in this act, \* \* \* sixty per centum ad valorem: \* \* \*.

The board sustained the collector and overruled the protest except that as to certain "silk-finish lisle Milanese" gloves which were admitted to have been returned in error, the protest was sustained. We do not understand that the correctness of this part of the board's decision is questioned.

It is agreed that the yarn of which the gloves are made is composed of filaments manufactured from cellulose which was obtained from cotton waste by subjecting the same to a chemical treatment. Cotton is composed of 90 per cent cellulose.

The appellants contend that under the conceded facts the gloves are made of vegetable fiber, and therefore directly dutiable under paragraph 314 of the same act, the material part of which is as follows:

314. Clothing, ready-made, and articles of wearing apparel of every description, including neckties or neckwear composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem: \* \* \*

It therefore becomes necessary to consider the meaning of the words "vegetable fiber," as used in paragraph 314, and also to refer to cellulose.

"Fiber" is defined in the Century Dictionary as:

A thread or filament. Any fine thread-like part of a substance as a single natural filament of wood, cotton, silk, etc.

In a collective sense a filamentous substance, more generally any animal, vegetable, or even mineral substance, the constituent parts of which may be separated into or used to form threads for textile fabrics.

In Murray and Bradley's New English Dictionary as:

One of a thread-like filament of organic structure which forms a textile or other material substance.

All plants are chiefly composed of a natural substance called cellulose. This is an essential constituent of the primary wall membranes of plant cells. (See Century Dictionary, "Cellulose.")

As its spelling would indicate, cellulose in form is composed of many cells or cavities.

Cellulose is obtained from plants by treating their substance with chemicals which breaks down the plant structure or fibers and separates the cellulose from the other materials composing the same.

In the case at bar the cellulose, after having been chemically obtained from the cotton waste, is by mechanical treatment formed into small threads or filaments, which in turn are made into yarn from which the gloves in question are manufactured, so that the fiber—that is, the thread or filament of which the gloves are made—is not a true vegetable fiber in its natural form or shape, but is a new manufactured fiber, although composed of the same vegetable substance, cellulose, which in a different form was the main element composing the vegetable fiber in a state of nature.

We do not think this manufactured fiber is the vegetable fiber referred to under paragraph 314, and so hold that the gloves are not dutiable thereunder as being included in the specific enumeration of wearing apparel composed of vegetable fiber.

It is not like the case of mercerized cotton, where the natural cotton fiber is chemically treated to the extent of producing a change in its appearance without breaking down or destroying the fiber itself.

The appellants further contend that these gloves should be held dutiable by similitude to wearing apparel in chief value of cotton or other vegetable fiber under paragraph 314.

We learn from the record that the yarn of which these gloves are made is designated as artificial silk; that the gloves are very similar in quality and texture to mercerized cotton gloves and are generally known, bought, and sold as such, although sometimes called and sold as “silkette” or “silk-finish” gloves.

It is not contended that mercerized cotton gloves are other than wearing apparel made of cotton or vegetable fiber within the meaning of paragraph 314.

The recognized doctrine is invoked that if an article is found not enumerated in the tariff laws, then the first inquiry is whether it bears a similitude either in material, quality, texture, or use to which it may be applied, to any article enumerated as chargeable with duty and if it does, and the similitude is substantial, it is deemed to be the same and to be charged accordingly.

The appellants in effect insist that, being composed of a vegetable substance, the importation in respect of its quality bears a greater resemblance to apparel made of vegetable fiber than it does to apparel made of silk, which, admittedly, is not a vegetable fiber; that in respect of quality and texture the gloves more resemble mercerized cotton gloves than silk gloves, while in respect of use they may well be said to substantially resemble either gloves made of silk or cotton.

The Government contends that because the yarns from which they are made is artificial silk, it follows that the gloves more resemble those made of silk than those made of vegetable fiber. We are unable to agree with this contention.

An artificial substance is one made in imitation of another or as a substitute for it. The words "artificial silk" do not *per se* suggest such a resemblance as necessarily brings the article so described within the application of the similitude section of the tariff act. They are but a name for something that is an imitation of or is a substitute for real silk.

We think one vital fact which makes against the Government is that these gloves are made of a vegetable substance.

Manifestly yarn or gloves made of cellulose, a vegetable substance, bear a much greater similitude, so far as material is concerned, to a vegetable fiber than to a silk fiber, and the gloves, as we understand the record, and in fact it is not otherwise contended, in respect of quality and texture, more resemble cotton gloves than silk gloves.

We are clear that the appellants satisfy the requirements of the doctrine invoked above, and that the gloves are dutiable by similitude under paragraph 314 as wearing apparel in chief value of cotton or other vegetable fiber.

The case of *Hardt, Von Bernuth & Co. v. United States* (146 Fed. Rep., 61), decided in 1906, is much like the case now before us. There the Circuit Court of Appeals for the Second Circuit in a well-reasoned opinion came to a similar conclusion.

See also *Patterson & Co. v. United States* (166 Fed. Rep., 733).

We have given due consideration to the case of *John Wanamaker v. United States* (175 Fed. Rep., 900; T. D. 28217), which is relied upon as a controlling authority in favor of the Government. If such be its interpretation, we are not disposed to follow it.

There the record as set forth in the decision of the court seems to have presented no question for determination other than what should be done when there was nothing to pass upon except the protest itself. No evidence germane to any issue raised by the protest had been offered, and the claim presented to the court was upon a different article than that covered by the protest.

The merits of the case were not discussed in the opinion, and, as we understand, there was nothing before the court which would warrant a course different than what was adopted, namely, to affirm the decision of the board.

We do not regard it as an authority upon the question before us.

The decision of the Board of General Appraisers is reversed, except as to the protest relating to "silk-finish lisle Milanese" gloves, and as to that protest it is *affirmed*.

UNITED STATES *v.* GABRIEL & SCHALL (No. 32).<sup>1</sup>

## PRECIPITATED CARBONATE OF BARYTA.

Under paragraph 489, tariff act of 1897, native or precipitated carbonate of baryta was nondutiable.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 28921).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

*Curie, Smith & Maxwell* (*W. Wickham Smith* on the brief) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of United States General Appraisers reversing the action of the collector at the port of New York and sustaining the protests of the appellees. The importation consisted of merchandise known as "carbonate of baryta," which was returned for duty by the appraiser as chemical salts at 25 per cent ad valorem, under paragraph 3 of the tariff act of 1897, which imposes the rate of 25 per cent ad valorem "on all chemical salts not specially provided for by this act." The protestants claimed that the merchandise was exempt from duty under paragraph 489 of said act, which reads:

Baryta, carbonate of, or witherite.

It is the claim of the Government that this importation is a precipitated carbonate of baryta, and that the carbonate mentioned in the free list is the native carbonate of baryta, and that the term "carbonate of baryta" in the free list does not include a precipitated carbonate of baryta. The one distinction between the native carbonate of baryta and the precipitated carbonate of baryta is in its purity. Precipitated carbonate of baryta is sometimes 99 per cent pure; oftener, we infer from the testimony, 95 per cent pure, while native carbonate of baryta is shown by the testimony to be from 78 to 94 per cent pure, but in certain specimens is found to be practically entirely pure.

The same question was raised between these same parties in a former case and the Board of General Appraisers then held the importation dutiable as claimed in the present case by the Government. This case was taken by appeal to the Circuit Court for the Southern District of New York, and in an opinion by Judge Wheeler (121 Fed. Rep., 208) the decision of the Board of General Appraisers was reversed. The Government then made up this new case, offered some

<sup>1</sup> Reported in T. D. 31108 (19 Treas. Dec., 1228).

additional testimony to show the distinction between precipitated carbonate of baryta and natural carbonate of baryta, the Board of General Appraisers, however, finding in effect that the introduction of the new testimony before the board in the present case did not justify the board in departing from the decision rendered by the circuit court in the previous case.

The history of the legislation relating to this substance is in brief:

By the tariff act of 1883, Schedule A, a tariff was laid on baryta as follows:

Baryta, sulphate of, or barytes, unmanufactured, ten per centum ad valorem.

Baryta, sulphate of, or barytes, manufactured, one-fourth of one cent per pound.

In the same act there was placed on the free list: "Baryta, carbonate or witherite."

In the act of 1890, by paragraph 49:

Baryta, sulphate of, or barytes, including barytes earth, unmanufactured, one dollar and twelve cents per ton; manufactured, six dollars and seventy-two cents per ton.

In the same act, in paragraph 500 of the free list, appears: "Baryta, carbonate of, or witherite."

The act of 1894, paragraph 395, continued on the free list:

Baryta, carbonate of, or witherite, and baryta, sulphate of, or barytes, unmanufactured, including barytes earth.

But paragraph 37 of the same act made "Baryta, sulphate of, or barytes, manufactured, dutiable, three dollars per ton."

In the tariff act of 1897, paragraph 44, it is provided:

Baryta, sulphate of, or barytes, including barytes earth, unmanufactured, seventy-five cents per ton; manufactured, five dollars and twenty-five cents per ton.

And in the free list, paragraph 489, appears: "Baryta, carbonate of, or witherite."

It will be seen that in the act of 1883, as well as in the act of 1890, the distinction was not made between manufactured and unmanufactured baryta, but was made between sulphate of baryta and carbonate of baryta, the latter being free of duty. The same words occur in the tariff act of 1897, and if given the same significance, would lead to the result that carbonate of baryta, irrespective of the manner of its production, was subject to entry free of duty.

We agree with the board in holding that there has been no such change of the status of this importation shown by the testimony in the later case as justifies us in departing from the rule of the circuit judge on the former appeal of these parties, and we are further satisfied that the language of the free list is broad enough to include this importation.

The order of the Board of General Appraisers is affirmed.

TAXIS v. UNITED STATES (No. 36).<sup>1</sup>

## BOLERO JACKETS FOR WOMEN.

Garments designed to be worn about the shoulders by women, if made in network or openwork design and of silk cord and braid, taking a shape like that of bolero jackets, were dutiable as articles of wearing apparel wholly or in chief value of silk, under paragraph 390, tariff act 1897.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 29946).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

By this appeal we are called upon to say whether or not the Board of General Appraisers at New York was correct in affirming the action of the collector, assessing certain merchandise for duty at 60 per cent, under paragraph 390 of the tariff act of July 24, 1897. That paragraph reads as follows:

390. Laces, and articles made wholly or in part of lace, edgings, insertings, galloons, chiffon or other flouncings, nets or nettings and veilings, neck ruffings, ruchings, braids, fringes, trimmings, embroideries and articles embroidered by hand or machinery, or tamboured or appliqued, clothing ready-made, and articles of wearing apparel of every description; including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all of the above-named articles made of silk, or of which silk is the component material of chief value, not especially provided for in this act, and silk goods ornamented with beads or span-gles, of whatever material composed, sixty per centum ad valorem: *Provided*, That any wearing apparel or other articles provided for in this paragraph (except gloves) when composed in part of india-rubber, shall be subject to a duty of sixty per centum ad valorem.

The importers, appellants, specify paragraph 391 as that which should control. We quote it:

391. All manufactures of silk, or of which silk is the component material of chief value, including such as have india-rubber as a component material, not specially provided for in this act, and all Jacquard figured goods in the piece, made on looms, of which silk is the component material of chief value, dyed in the yarn, and containing two or more colors in the filling, fifty per centum ad valorem: *Provided*, That all manufactures, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool.

If we can clearly ascertain just what the articles consist of and to what uses they are put, the difficulties of the case will readily disappear and classification become simple.

Some of the articles are network garments, to be worn upon the shoulders and backs and fronts of the dresses of women. They are really short network jackets, made of silk cord and braid, fitting to the neck and shoulders, and shaped much like what are generally known as bolero jackets. While, doubtless, these are worn principally

<sup>1</sup> Reported in T. D. 31109 (19 Treas. Dec., 1230).



for their style, yet they must have some practical usefulness as coverings, and are very clearly articles of wearing apparel, dutiable under paragraph 390.

Other articles are also made of silk cord and silk braid. They are of open-work design, intended to be worn upon the neck, front, and upper part of the back of a woman's dress or waist. While they are not like jackets, they have fitting necks and are suitable and adapted for use as parts of the collars of women's waists. These garments may be stitched or pinned onto a waist, yet evidently they can be easily taken off one and put upon another. We should say that although ornamentation is their important use, still they are none the less collars for women's wear, and are, when imported, in fit condition to be used by being pinned or stitched to the neck of waists or other garments worn about women's necks and shoulders.

We are of the opinion that the Board of General Appraisers properly held that the articles were collars made of silk and silk braid, and were therefore dutiable as articles of wearing apparel wholly or in chief value of silk.

As bearing upon the question, see *Goldenberg v. United States* (130 Fed. Rep., 108); *Goldenberg v. United States* (152 Fed. Rep., 658); *United States v. Hesse* (158 Fed. Rep., 407; T. D. 28519).

This decision does not overrule *Garrison, Wright & Co. v. United States* (121 Fed. Rep., 149), a decision by the Circuit Court for the Southern District of New York, and relied upon by appellants, for it does not appear that the articles before the court in that case were collars or wearing apparel.

The decision of the Board of General Appraisers is affirmed.

#### FENSTERER & RUHE *v.* UNITED STATES (No. 37).<sup>1</sup>

##### MAGNESIA ARTICLES OF THE CHARACTER OF BISQUE AND OTHER EARTHENWARE.

Bisque rings, insusceptible to decoration and designed for incandescent burners were not dutiable as bisque under section 96, tariff act of 1897, but under section 6 of that act, as an unenumerated manufacture.—*Schoenmann v. United States* (119 Fed. Rep., 584) followed.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from decision of the Board of United States General Appraisers, Abstract 21678 (T. D. 29946); transferred from United States Circuit Court for the Southern District of New York.

[Reversed.]

*Comstock & Washburn* (*J. Stuart Tompkins* on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

The question involved in this appeal is the proper classification of certain articles spoken of as rings for incandescent gaslights. The

<sup>1</sup> Reported in T. D. 31110 (19 Treas. Dec., 1231).

Board of United States General Appraisers found that the rings were bisque, liable for duty at 55 per cent ad valorem under paragraph 96 of the tariff act of 1897, which reads as follows:

96. All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem.

The importers have appealed, contending that the rings are properly dutiable at 20 per cent ad valorem, under section 6 of the aforesaid tariff act, as nonenumerated manufactured articles. The case was submitted to the Board of Appraisers upon a stipulation, wherein it was agreed that the commodities involved are identical with those which were before the Board of Appraisers in the Block Light Co.'s case (T. D. 29512), and that the facts which were before the Board of Appraisers in that case should be deemed before the board in this.

Turning to the evidence which was heard and considered in the Block Light case, it appears very clearly that the rings are bisque or biscuit ware, which is an unglazed clay product either of china or earthenware mixture. It is unnecessary to recapitulate the testimony, for it fully supports the conclusion reached by the Board of Appraisers. But even if the articles are found to be bisque, the importers urge that paragraph 96 is limited in its application to articles that are susceptible of decoration, and that the same principle must be used in construing paragraph 96 that the courts have held proper to apply to paragraph 97, which reads as follows:

97. Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem.

As we agree with the contention that the bisque rings are not susceptible of decoration according to usual commercial practice (*United States v. Wing*, 167 Fed. Rep., 317), the inquiry is resolved into this, How should bisque rings for incandescent burners, the rings not being susceptible of decoration, be classified?

If the question were wholly new, we should not find it difficult to sustain the argument advanced by the learned counsel for the Government, that section 96 is comprehensive enough to cover all articles of whatever character made of bisque or of which bisque is the component material of chief value, without regard to susceptibility to decoration. The history of the china and pottery schedules would seem to lead to such a conclusion. If we go back to the tariff act of 1897, we find that the substance of the paragraphs was-as follows:

94. Common yellow, brown, or gray earthenware, plain, embossed, or salt-glazed common stoneware, and crucibles, all the foregoing not decorated in any manner, twenty-five per centum ad valorem; Rockingham earthenware not decorated, forty per centum ad valorem.

95. China, porcelain, parian, bisque, earthen, stone, and crockery ware, including clock cases with or without movements, plaques, ornaments, toys, toy tea sets, charms, vases and statuettes, painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if plain white and without superadded ornamentation of any kind, fifty-five per centum ad valorem.

96. All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem.

The tariff act of 1894, so far as material, contains the following provisions:

83. Common yellow and brown earthenware, plain or embossed, common stoneware, and crucibles, not decorated in any manner, twenty per centum ad valorem.

84. China, porcelain, parian, bisque, earthen, stone and crockery ware, including plaques, ornaments, toys, charms, vases, and statuettes, white, not changed in condition by superadded ornamentation or decoration, thirty per centum ad valorem.

85. China, porcelain, parian, bisque, earthen, stone and crockery ware, including plaques, ornaments, toys, charms, vases, and statuettes, painted, tinted, enameled, printed, gilded, or otherwise decorated in any manner, thirty-five per centum ad valorem.

Going back to the tariff act of 1890, we find these material provisions:

99. Common brown earthenware, common stoneware, and crucibles, not ornamented or decorated in any manner, twenty-five per centum ad valorem.

100. China, porcelain, parian, bisque, earthen, stone and crockery ware, including plaques, ornaments, toys, charms, vases, and statuettes, painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if plain white, and not ornamented or decorated in any manner, fifty-five per centum ad valorem.

101. All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures of the same, by whatsoever designation or name known in the trade, including lava tips for burners, not specially provided for in this act, if ornamented or decorated in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem.

Examination of the tariff act of 1883 discloses the following paragraphs:

124. Brown earthenware, common stoneware, gas-retorts, and stoneware not ornamented, twenty-five per centum ad valorem.

125. China, porcelain, parian, and bisque, earthen, stone and crockery ware, including plaques, ornaments, charms, vases, and statuettes, painted, printed, or gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem.

126. China, porcelain, parian, and bisque ware, plain white, and not ornamented or decorated in any manner, fifty-five per centum ad valorem.

127. All other earthen, stone, and crockery ware, white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act, fifty-five per centum ad valorem.

The enumerations in these several laws appear to be very complete and to have been made with a view of including all kinds of china,

stone, and crockery ware, without excepting articles not capable of ornamentation or decoration. Unless this construction is correct, the only place of classification for the many articles of stone and crockery that are not susceptible of decoration has been under the commonly called "catch all" or nonenumerated clauses of the several acts. It scarcely seems reasonable to believe that Congress so intended. The careful enumeration of stone and crockery ware, a very small portion of which is capable of decoration, adds strength to the belief that the statutes heretofore and in 1897 were designed to cover the whole range of china and pottery without exception of such as could not be decorated.

But we find that there has been a trend of construction of the act of 1897 in the opposite direction, with which we feel constrained to put this court in accord, unless the cases can be distinguished upon some substantial basis. The tenor of the decisions referred to is that language such as occurs in paragraph 96, already quoted, limits application of the law to articles that are susceptible of decoration.

In *Dingelstedt v. United States* (91 Fed. Rep., 112) the Court of Appeals of the Second Circuit, in considering the proper classification of certain carbon points for arc lights, held that the phrase "all articles composed of \* \* \* mineral substances \* \* \* if decorated in any manner, forty per centum \* \* \*; if not decorated, thirty per centum \* \* \*," as used in paragraph 86 of the tariff act of 1894, which is a part of Schedule B, relating to earthenware, and glassware, and in which the duty on articles not specially provided for is fixed, should be construed, by reason of the collocation of the paragraph, as applying only to articles composed of mineral substances similar to those enumerated in that schedule. The learned court, however, in reaching its conclusion, expresses the opinion that "apparently" Congress had in mind, when enacting the statute, articles susceptible of decoration. It would seem to us not a strain to regard the argument of the court as applicable only to the particular paragraphs which the court had under examination; but we find that the reasoning has been extended and quoted as a correct interpretation of the sections of the tariff act of 1897, where like language is used, and which generally control duties to be assessed upon china and pottery.

The *Dingelstedt* case (*supra*) was commented upon and distinguished in *Hempstead & Son v. United States* (158 Fed. Rep., 584), where the Court of Appeals of the Third Circuit, speaking through Judge Gray, construing paragraph 100 of the tariff act of July 24, 1897, providing for "\* \* \* vessels or articles of glass \* \* \* all the foregoing, filled or unfilled, and whether their contents be dutiable or free \* \* \*" held that in view of the history of the legislation, the reference to the filling of such articles did not imply

that only articles capable of being used as containers were covered by the paragraph. That case, however, is not directly pertinent to the discussion at hand, because of the difference in the language and history of statutes examined.

*Crawford v. United States* (T. D. 28539) is very close to the questions involved. The articles affected were magnesia rings used for holding incandescent mantles in position. Judge Martin, sitting in the circuit court, recapitulated the cases wherein the Board of Appraisers at New York had decided that magnesia tips or rods used for holding incandescent mantles in position could not be classified under paragraph 97, since the decision in the *Dingelstedt* case (*supra*). He said:

The Board of United States General Appraisers at New York on October 16, 1903, held, G. A. 5452 (T. D. 24737), that magnesia tips or rods, used for holding incandescent mantles in position, were composed wholly of clay, with a trace of oil acting as a binder; that said articles were nonmetallic; that they are not earthenware as that term is used in the tariff, nor can they be classified under paragraph 97, since the decision of the circuit court of appeals in the *Dingelstedt* case (91 Fed. Rep., 112), which restricts the application of that paragraph to articles that are susceptible of decoration, and that those in question were not. The same board on April 6, 1906, held that magnesia rings, identical with the goods in controversy, were dutiable under section 6 of the tariff act as "unenumerated manufactured articles." Abstract 10830 (*supra*). The same board on September 13, 1906, sustained the protest of the importer on magnesia rings like these, and held them properly dutiable under section 6 at 20 per cent ad valorem. Abstract 12844 (*supra*).

If the board were correct in the cases above referred to, they were not correct in their decision in this case. I assume that the previous decisions of the board are correct, and therefore hold that the merchandise in question is dutiable under said section 6 at 20 per cent ad valorem. Therefore the decision of the Board of General Appraisers is reversed.

We find also that the highest authority, the Supreme Court, in *United States v. Downing* (201 U. S., 354), approved the opinion of the court in the *Dingelstedt* case by a positive declaration that the words of paragraph 97, "if not decorated in any manner, thirty-five per cent ad valorem; if decorated, forty-five per cent ad valorem," covered articles susceptible of decoration, and not articles decorated or not decorated, irrespective of their capability of being decorated. It is true that the Supreme Court was considering carbon sticks, very different articles from those before us, affected by paragraph 96, but the view expressed of the language used by Congress in paragraph 97 bears directly upon the construction that should be put upon similar words in paragraph 96 and impel us to adopt the view that because the articles under consideration are bisque, not susceptible of decoration, they can not be classified under paragraph 96.

The effect of this ruling is to put the articles under the nonenumerated clause, unless the similitude clause (sec. 7) applies. Counsel for the Government says that it may be invoked, and to support his

argument cites *Hahn v. United States* (100 Fed. Rep., 635), *Tiffany v. United States* (112 Fed. Rep., 672), *United States v. Wing* (167 Fed. Rep., 317), *United States v. Wing* (119 Fed. Rep., 479), *Waddell v. United States* (124 Fed. Rep., 301), and *United States v. Dana* (99 Fed. Rep., 433).

The application of the similitude clause in the *Downing* case should be considered too. The exact facts which were presented by the record in the *Downing* case were, however, very unlike those in this case. There the imported merchandise was carbon sticks, and although a slight process had to be applied to fit them for electric lighting, yet the court held that their use was for such purpose only, and that they were practically carbons for electric lighting, and therefore similar to carbons defined by paragraph 98 of the act of 1897, which provided for carbons for electric lighting.

We do not construe the decision as compelling a ruling that bisque holders not capable of decoration, being articles not enumerated, are similar either in material, quality, texture, or the use to which they may be put, to bisque holders enumerated, which are capable of decoration. This would be unreasonable, for it would be in effect a ruling that though bisque holders capable of decoration are made subject to a duty of 55 per cent ad valorem, bisque holders not capable of decoration shall be subject to the same duty, because such holders are similar to those capable of decoration.

To an argument of this kind, the Court of Appeals of the Third Circuit, in *Schoenmann v. United States* (119 Fed. Rep., 584), said:

\* \* \* We do not think that this section is susceptible of this interpretation, or was meant to apply except to articles of manufacture, which, though different and distinct from each other, are similar in the respects mentioned in the statute. In this case there is an identity of material, not similarity, and when the statute expressly prescribes a duty for this material, when it is in a certain condition, it must be taken to preclude the application of the similitude statute to the same material not in that condition. It would be equally as reasonable to say that because certain stones fashioned into monuments or into cubical blocks are dutiable, stones not so fashioned, and not in building shapes, should be liable to the same tax on the ground of similarity of material.

*United States v. Dana et al.* (supra) decided that to constitute similitude of use within the meaning of the similitude clause of the tariff act of 1894, which would require a nonenumerated article to be classified with one enumerated, the uses of the two need not be identical or interchangeable. The product which the court had under consideration was ferrochrome, which was held dutiable under paragraph 110 of the tariff act of 1894 because of its similitude in use to ferromanganese, which was covered by such paragraph. With the general ruling of that case, that the similitude section does not require identity, but is satisfied by similarity in use, we do not dis-

agree, but no principle of the construction of language such as is necessary to be considered in the present case was discussed by the court.

In *Hahn v. United States* (100 Fed. Rep., 635), *supra*, the merchandise in question comprised small cups, shoe-hook and glove-hook handles, knife handles, paper weights, slabs for match boxes and for blotting papers, and similar articles manufactured wholly of agate or of onyx. The court considered the provisions of the tariff act of March, 1883, which pertained to precious stones, and contained (sec. 2499) a clause relating to every nonenumerated article which bore a similitude either in material, quality, texture, or the use to which it might be applied, to any article enumerated in the title as chargeable with duty. Section 1513 of the last-mentioned tariff act also provided for the levy, collection, and payment on the importation of "all raw or unmanufactured articles not herein enumerated or provided for and on all ~~articles~~ manufactured in whole or in part not enumerated or provided for." The decision was that manufactured articles from agate or onyx were subject to the same rate of duty as that imposed upon precious stones, such articles being identical in material with well-known kinds of precious stones, although advanced by their manufacture into specific commercial articles beyond the condition of stones.

*Tiffany v. United States* (*supra*) sustained the view that the loose pearls which were involved in the suit were not covered by the provisions of the tariff act of 1897, sections 434, 435, and 436, classifying jewelry and precious stones. The court said that before the pearls could be included in the general clause of manufactured articles not otherwise provided for it must first be found that they do not fall within the similitude section, No. 7. Inasmuch as the court was of the opinion that the pearls were similar to pearls provided for, the similitude clause was applicable. The case, however, is not directly relevant.

*Waddell & Co. v. United States* (*supra*) affected composition pumice stone, a manufactured article, complete and ready for use. Duty was assessed by the collector under the provision in paragraph 97, heretofore quoted in this opinion. The importers there contended that the articles were dutiable under paragraph 92, Schedule B, section 1, of the said tariff act, which provides for pumice stone wholly or partly manufactured, either directly or as being similar to such pumice stone within the meaning of section 7, or the similitude clause. Judge Lacombe, sitting in the circuit court, looked upon paragraph 92, Schedule B, chapter 1, of the tariff act of 1897, as not applicable to the article under consideration. He was further of the opinion that paragraph 97 could not be applied "in view of the decision of the cir-

cuit court of appeals in *Dingelstedt v. United States* (91 Fed. Rep., 112).” But he held that under the similitude clause the merchandise was dutiable as if it were pumice stone, because in texture, material, and use there was a substantial similarity to pumice stone enumerated in the paragraph referred to. In so far as this case refers to the doctrine of the *Dinglestedt* case, it agrees with our judgment of what was decided therein, while upon the facts the case perhaps is distinguishable from that under consideration. But if we grant that it is somewhat in conflict with the general view to be taken of the applicability of the similitude clause to a state of facts, such as we have in this case, the opinion of the circuit court of appeals in *Schoenmann v. United States* (supra), impresses us as the sounder view.

*United States v. Behrend* (supra) is a very recent case decided by the Court of Appeals for the Second Circuit. Retort settings were classified by the collector as articles composed of earthy or mineral substances, under paragraph 97 of the tariff act of 1897 heretofore quoted. The Board of Appraisers classified the articles under paragraph 87, which provided for fire brick weighing not more than 10 pounds each, not glazed, enameled, ornamented, or decorated in any manner, and for the same articles glazed, enameled, ornamented, or decorated. Judge Ward, speaking for the court, construed *Dingelstedt v. United States* (supra) as holding that paragraph 86 of the tariff act of 1894, which is similar to paragraph 97 of the tariff act of 1897, was applicable only to articles susceptible of decoration, and further held that the retort settings being fire brick, and not susceptible of decoration, they could not be enumerated in paragraph 97, nor could they be enumerated in paragraph 87, because they weighed more than 10 pounds each. Under such a state of facts, the similitude, clause was called upon, and the goods were held to resemble fire brick, and therefore classification for fire brick was proper, although the brick weighed more than 10 pounds each. The court said that identity would ordinarily exclude all question of similitude, but not in that case, because of the distinction made between fire brick under and over 10 pounds in weight. We think the facts of this last case distinguish it from that before us. It is to be mentioned that Judge Noyes dissented, upon the ground that as the brick exceeded 10 pounds in weight they could not be brought within the paragraph classifying fire brick weighing not more than 10 pounds by similitude. He said:

\* \* \* In my opinion, the similitude clause can not have that effect, and does not bring in the identical material embraced in an act when in a condition expressly excluded from its operation.

Without extending this opinion, we conclude that the reasoning of the court in *Schoenmann v. United States* (supra) is correct. It fol-



lows that the bisque holders in the case before us, not presenting conditions prerequisite to their being dutiable under paragraph 96 of the act, Congress did not intend that the distinctions found to exist in paragraph 96 might be disregarded by the similitude section.

The decision of the Board of General Appraisers is reversed, and the cause is remanded with directions to assess duties under section 6 as nonenumerated manufactured articles.

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KEVENEY v. UNITED STATES (No. 42). GERMANIA IMPORTING CO. v. UNITED STATES (No. 52).<sup>1</sup>

FIGURED OR PLAIN, OR INLAID LINOLEUM.

A plastic material composed of cork and linseed oil when placed on a stencil over a burlap foundation and forced by pressure into separate and distinct bodies, in separate and distinct colors, in separate and distinct positions, and through to the base, constitutes inlaid linoleum and was dutiable as such under paragraph 337, tariff act of 1897.

United States Court of Customs Appeals, November 30, 1910.

APPEALS from decision of the Board of United States General Appraisers, G. A. 6951 (T. D. 30183).

[Affirmed.]

*John Gibbon Duffy* (*Joseph G. Kammerlohr* of counsel) for appellants.  
*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

In each of these cases the importation was admittedly subject to duty under paragraph 337 of the tariff act of 1897, which reads as follows:

Oilcloth for floors, stamped, painted, or printed, including linoleum or corticene, figured or plain, and all other oilcloth (except silk oilcloth) under twelve feet in width not specially provided for herein, eight cents per square yard and fifteen per centum ad valorem; oilcloth for floors and linoleum or corticene, twelve feet and over in width, inlaid linoleum or corticene, and cork carpets, twenty cents per square yard and twenty per centum ad valorem. \* \* \*

The merchandise in question consisted of linoleum, and the question is presented whether it was dutiable as figured or plain at 8 cents per square yard and 15 per cent ad valorem or as inlaid linoleum at 20 cents per square yard and 20 per cent ad valorem. The Board of General Appraisers held that it came under the latter designation, and the importer appeals.

There is no clear proof in the record as to whether there was an established commercial designation of goods answering the descrip-

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<sup>1</sup> Reported in T. D. 31111 (19 Treas. Dec., 1239).

tion of those involved in this case at the time of the enactment of the tariff act of 1897, so that the question presented is whether the linoleum in question is shown to have been, as a matter of fact, inlaid linoleum.

The evidence shows the method of manufacture to be as follows: A plastic material composed of cork and linseed oil and another material, the nature of which is not disclosed, in different colors, is used. A stencil is then placed over the burlap foundation, the material of each color, the shape and figure of which are formed by the stencil, is applied, and after being so placed pressure is applied on the whole. The result of the several operations is that separate and distinct bodies and colors of the plastic material are put in separate and distinct positions, the separate portions of the linoleum in the different colors extend through to the base and give the same appearance as linoleum inlaid by the other process hereinafter described, with the exception that the line between the different colors is not as clear and distinct as it is in the case of linoleum inlaid by cutting out the figure from the previously applied background and filling the holes thus made with the desired color. In all other respects, however, the operation in the manufacture of the article under consideration is the same as that used in the other process referred to, and the result is a product differing very slightly from the other.

The contention of the importer is that the word "inlaid" implies that the separate substance should be laid in like mosaics, parquetry, etc. The definition given by the lexicographers is as follows:

**Johnson:**

Inlay—diversify with different bodies inserted into the ground or substratum.

**Worcester:**

Inlaid—diversified by the insertion of different bodies or substances.

**Century:**

Inlay—to lay or insert in something; fix into or upon something; as for ornamentation.

**Murray:**

Inlay—to lay or embed (a thing) in the substance of something else so that its surface becomes even or continuous with that of the matrix.

**Standard:**

Inlay—lay within or insert in something.

**Webster:**

Inlay—to set into the body of a surface or ground material; as to inlay arabesques; also, to pattern or adorn (a surface or ground) by the insertion of other material; as to inlay a panel with lilies; to adorn by inlaying, etc.

In *Hunter v. United States* (121 Fed. Rep., 207), relied upon by the importer, Judge Wheeler, in dealing with so-called granite linoleum, said:

“Inlaid” means laid into a definite space, as a separate part of the material of the structure; and the product is of a higher grade of manufacture, on which the higher duty appears to be laid.

This statement of Judge Wheeler does not relate to the manner in which the laying in should occur, as that question was not before the court. Nor do we conceive that that method should be controlling. It is the finished article which is made the subject of duty, and the method by which the result is obtained is immaterial. The process by which the material in question is made results in a substantial separation of the different colors and figures, and the actual laying in of the substance in different figures so that the inlaid substance extends through the whole thickness of the linoleum and can be worn down to the base without effacing or affecting the figure. We hold this to be, in the sense in which the term was employed in the tariff act, inlaid linoleum.

The case of *United States v. Scott & West* (104 Fed. Rep., 285; T. D. 28291), called the oak plank case, is relied upon by counsel for the importer. In that case the court said:

From the evidence it appears that at the time of the passage of the Dingley Act three kinds of linoleum were commonly known in the trade.

\* \* \* \* \*

(3) Inlaid linoleum, in which the pattern was produced by laying upon the burlap differently colored pastes according to the pattern desired, the same being forced into the burlap by pressure, as above stated. These differently colored pastes were laid upon the burlap in one of two ways: (a) By cutting out the figure from the previously applied background and filling the holes thus made with the desired color; or (b) by applying the several colors to the burlap with a stencil.

The court further said:

The manufacture of the goods in question is not that used in making plain, printed, or inlaid linoleum at the time of the passage of the Dingley Act, nor is it that used in the making of granite linoleum either before or afterwards. The United States has not shown that the importation is “inlaid linoleum” with respect to its method of manufacture.

The circuit judge, in the case cited, therefore very clearly distinguished the merchandise there under consideration from that which we are now considering.

The decision of the Board of General Appraisers is affirmed.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

DE RONDE v. UNITED STATES (No. 66).<sup>1</sup>

BLEACHER'S BLUE CONTAINING FERROCYANIDE OF IRON.

An article containing ferrocyanide of iron that is used exclusively for bleaching purposes was not dutiable as a "color" under paragraph 45, tariff act 1897, but was dutiable under section 6 of that act.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 6624 (T. D. 28253).

[Reversed.]

*Walden & Webster* (Howard T. Walden of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General, and *Charles E. McNabb*, Special Attorney (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers which confirmed a decision of the collector of customs of New York in assessing duty on bleacher's blue. The merchandise was assessed under paragraph 45 of the tariff law of 1897, which provides for—  
blues, such as Berlin, Prussian, Chinese, and all others, containing ferrocyanide of iron, in pulp, dry or ground in or mixed with oil or water, eight cents per pound.

The appellant claims that the importation was dutiable under section 6 at the rate of 20 per cent ad valorem as an unenumerated manufactured article.

The contention is that paragraph 45 provides for colors—that is, paints or dyes—only; that bleacher's blue is not a color, and that as there is no other specific provision under which this article is dutiable it comes under the general provisions of section 6.

We think an examination of the statute clearly indicates that the blues referred to in paragraph 45 are the blues in paints and colors. With the heading under which this paragraph occurs, it would read as follows:

Paints, colors, and varnishes. \* \* \* blues, such as Berlin, Prussian, Chinese, and all others, containing ferrocyanide of iron, in pulp, dry or ground in or mixed with oil or water, eight cents per pound.

We think that the arrangement of this paragraph in the statute itself under the heading of "Paints, colors, and varnishes" is not to be ignored.

It is argued by counsel for the Government that if it be conceded that some of the blues enumerated in paragraph 45 are colors, nevertheless the phrase "all others" should be construed to mean all other blues, and so construed, it fairly includes blues which may not be colors, provided they contain ferrocyanide of iron ground in or mixed with water. But we thing not only the relation with which these

<sup>1</sup> Reported in T. D. 31112 (19 Treas. Dec., 1242).

words appear in the text of paragraph 45, but the heading under which that paragraph is placed in the statute itself, indicates that two elements were essential to bring the importation within the terms of that paragraph: First, it should consist of colors—that is, a paint or preparation to be used for dyeing—and, second, that it should answer to the description of blues such as Berlin, Prussian, Chinese, or some other containing ferrocyanide of iron. That the present importation contains a small portion of ferrocyanide of iron is conceded, the testimony showing that it contains 91.06 per cent of water and volatile substances, 8.94 per cent of solids, of which about 3.5 per cent is ferrocyanide of iron, 1 per cent of coal-tar color, the remainder of the solids consisting of other ingredients which are not determined.

The use to which the importation is put is exclusively for sale to manufacturers for bleaching purposes. In the bleaching process 1 pound of this production is used with 4,000 pounds of corn, potato, or wheat starch dissolved in water. The purpose of its use is not to give color to the product, but to make it white. If the word “colors” is used in the act to indicate a product to be used in producing colors or in coloring, either by spreading on the surface of a substance or as a dye, it is inapt to describe the importation in question.

A similar question was before the Board of General Appraisers in *United States v. Berlin Aniline Works*, G. A. 6272 (T. D. 27054). The question there presented was whether an extract of Persian berries was properly classified as a color under the provisions of paragraph 58, which occurs under the same heading as paragraph 45, and which imposes a duty upon all paints, colors, pigments, lakes, crayons, etc., not otherwise specially provided for. The article imported was used exclusively for staining food products. It was said by the board:

It does not seem, on a careful reading of paragraph 58, that this article belongs to paints, colors, pigments, etc., which are therein grouped.

This case was, on appeal to the Circuit Court for the Southern District of New York, affirmed on the opinion of the board. (154 Fed. Rep., 925.)

Another case following this is that of *In re Protest of Magnus & Lauer*, G. A. 6560 (T. D. 28018), in which chlorophyll, a green coloring matter produced from fresh vegetation and used for staining foods and essential oils, was held not to be a color within the meaning of paragraph 58 of the tariff act.

We see no room for distinguishing this case from those cited. As intimated above, the first essential to bring this case within paragraph 45 is to establish that it is a color in the sense in which that term is used in that subdivision of the tariff law. If it be found to be a color, then the next essential is to show that it contains ferrocyanide of iron. Admittedly it does contain this ingredient. But this does not obviate

the necessity of showing that it is a color within the meaning of the paragraph, and it is not such, either in its use or, as we think, in common understanding.

It may be added that this article has been imported since 1884 by the present importers and that it was not until 1906 assessed as a blue containing ferrocyanide of iron, and while it may be true that the Government is not precluded from now contending that it comes within paragraph 45, the fact is significant nevertheless.

We think the importation is subject to duty under section 6 as an unenumerated manufactured article.

The decision of the Board of General Appraisers is reversed.

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PETRU AMERICAN-IMPORTING CO. *v.* UNITED STATES (No. 83).<sup>1</sup>

SUBSTITUTE FOR COFFEE.

An article represented to be and sold as a substance not alone for coloring coffee, but as a substitute for a portion of each drawing of coffee, adding, it being claimed, to the quality, purity, and wholesomeness of the beverage as served, was dutiable under paragraph 283, tariff act of 1897, as a substitute for coffee.

United States Court of Custom Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 30547).

[Affirmed.]

*Comstock & Washburn* (*J. Stuart Tompkins* on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*W. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The protestant imported merchandise which was assessed at 2½ cents per pound under paragraph 283 of the tariff act of 1897 as an article used as a substitute for coffee. He protested upon the ground that the articles are not enumerated in the tariff act and should be held dutiable under section 6 of the act of 1897 as a nonenumerated manufactured article. The Board of General Appraisers overruled the protest and sustained the assessment. The case is brought here for review.

Merchandise very similar in its composition to some of that involved in this case was considered by the court of appeals in *Hazard v. United States* (175 Fed. Rep., 967). The court said of the article in controversy in that case:

The board finds that the article is not coffee and that paragraph 283 is intended to cover articles which are not coffee, but are used as substitutes for it. That this article, which the board finds is not coffee, is used as coffee or as a substitute for coffee seems to be undisputed. The paragraph in question recognizes the fact that some articles which are not coffee are used as substitutes therefor. If the article in question be not such a substitute, it certainly is similar in its use to articles which are. Indeed, it seems to have no other use.

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<sup>1</sup> Reported in T. D. 31113 (19 Treas. Dec., 1244).

The importations in question have in each instance substantially the same directions printed on the packages, the one reading:

Use 1 part of this fig essence to 2 parts of coffee. Pour boiling water over the mixture, let it draw 8 minutes and strain.

These directions are given on two of the compounds. The two other compounds are labeled "Coffee substitute." One contains on the label the statement: "Compound of chicory and sugar rape." The other, "Made only of figs."

The importer's witness testified that all of the articles represented by the various exhibits were used in the same way. It is true, he testified, that they were used for coloring coffee to make it a little darker than the natural color of the coffee. But every sale made by this importer of two of the brands at least was accompanied by the statement printed on the package:

This fig essence renders coffee to be the best, purest, and healthiest drink, so that it surpasses in its quality all other kinds of coffee essence, because it makes coffee better, gives the right color, and wholesome taste. It is recommended by the most excellent doctors and specialists.

This statement directly contradicts the testimony that the only purpose of the use of this preparation is to color the decoction.

The case is directly analogous to *Hazard v. United States*, except that in the present case this is not a complete substitute for coffee, but is a substitute for a portion of each drawing of coffee. We think it is in all substantial respects similar to the articles under consideration in the case cited, and the ruling of the board is affirmed.

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#### UNITED STATES *v.* CORDERO (No. 95).<sup>1</sup>

##### ENTRY SOUGHT BEFORE COMPLETION OF VOYAGE.

Entry implies the presence of the merchandise at the time entry is sought to be made and where a consignment of gin on board a mail steamer reached Key West August 3, 1909, and entries of the gin were presented by the importer on August 4, the commodity itself remaining on board ship while the vessel proceeded to another destination, but, returning, called again at Key West on a later day and subsequently to the going into full force and effect of the tariff act, 1909; section 29 of that act governed the entry of the gin August 10, 1909, and it was dutiable as entered of that day.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 6945 (T. D. 30161).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane*, special attorney), for the United States.

Submitted by appellee on record.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

Mr. Cordero, as owner, imported a quantity of gin from Antwerp, by way of Habana, to Key West, Fla. The vessel containing the gin

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<sup>1</sup> Reported in T. D. 31114 (19 Treas. Dec., 1245).

arrived at Key West on the 3d of August, but the gin was not unloaded at that date, but was carried through by the vessel to the port of Tampa and returned to Key West on the 6th. On the 4th of August Mr. Cordero presented his entries at the custom-house and was informed that as the gin had not arrived the entry could not be made for immediate consumption. Later, and on the 10th of August, he entered the gin and the assessment was made thereon under the tariff act of 1909.

He protested on the 11th of August against the payment of the increased duty under the tariff act of 1909, amounting to 35 cents per gallon, stating that the reason the gin was not unloaded on the 3d at Key West was that the vessel was carrying United States mail and she could not be detained to make a more minute search for the case of liquors, which had been stored in the bow of the steamer, far removed from the gangway, and adding that if the liquor had been landed on its arrival at port on the 3d the importer would have had ample time to make entry for the same and thereby saved the additional cost of 35 cents per gallon, and on appeal to the Board of General Appraisers the protest was allowed and a refund of 35 cents per gallon directed. The case is brought here by the Government for review.

It is apparent that the case is one of some hardship to the importer, as it is manifest that it was through no fault of his that the gin was not entered for assessment and liquidation on the 3d of August; but the question presented is whether there was authority to enter the goods on the 4th of August, when the entry was attempted in the absence of the goods themselves.

The language of section 29 of the tariff act of 1909 is—

That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof.

The board in its opinion held, what we think is abundantly sustained by the authorities, that the importation actually takes place whenever the goods reach the port of destination, and that the right of Government to exact duties accrues in the fiscal sense of the term at that time. See *United States v. Vowell* (5 Cranch, 368); *United States v. Arnold* (24 Fed. Cas., 872); *Meredith v. United States* (13 Pet., 494); In *James's case*, G. A. 4869 (T. D. 22828).

If the importer was entitled to the rate of duty which attached in favor of Government when the vessel reached the port, without regard



to when the entry was made, the conclusion of the Board of General Appraisers was correct. It was said by the board in its opinion:

An importation must always precede an entry, and the collector may have been justified in refusing the entry offered August 4, when he had no official knowledge that the merchandise in question had been imported into the port of Key West; but when it comes to the ultimate determination of the question whether the merchandise should pay duty under the old or the new law, the fact as to the date of the importation and not the collector's official knowledge must be considered.

We are constrained to hold that the board was in error in this holding. The language of section 29 clearly imports that the date when the entry is made is the date at which the goods become dutiable at the rate fixed by the new act. In plain terms, it is provided that goods previously imported for which no entry has been made shall be dutiable under the new act and not under any other act.

We agree with the view expressed by the board that the collector of customs was justified in declining to enter these goods on the 4th of August. Entry implies the presence of the merchandise at the time, for the entry is required to be followed by an inspection and appraisal of the goods. (Rev. Stat., 2899, 2901.) It would seem to follow that the goods were dutiable under the new act, unless there is some way by which we can relieve from the hardship resulting to the importer through no fault of his own. Unfortunately, we find no provision of law which justifies the court in departing from the rule fixed by this section.

It follows that the decision of the Board of General Appraisers must be reversed.

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ILLFELDER v. UNITED STATES (No. 112).<sup>1</sup>

**SPARKLERS OR SPARKLETS.**

A mixture of iron filings, magnesium, aluminum, nitrate of barium, and gum, attached to a thin strip of metal to serve as a handle, constituting what are known as "sparklers" or "sparklets," were not dutiable as toys under paragraph 418, tariff act 1897, but as manufactures of metal under paragraph 193 of said act.

United States Court of Customs Appeals, November 30, 1910.

TRANSFERRED from the United States Circuit Court for the Southern District of New York, G. A. 6885 (T. D. 29625.)

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

A mixture of iron filings, magnesium, aluminum, nitrate of barium, and gum, in proportions not disclosed by the record, attached to a

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<sup>1</sup> Reported in T. D. 31115 (19 Treas. Dec., 1247).

thin strip of metal or wood to serve as a handle, constitutes an article of merchandise known as "sparklers" or "sparklets." When ignited by a lighted match or by scratching a match-like preparation with which the end of some of the "sparklers" is fitted, a vigorous combustion of the magnesium and iron filings is immediately set up, followed by a display of brilliant sparks, stars, and scintillations. The combustion of the metallic components of the merchandise produces heat enough to raise perceptibly the temperature of the metal handle to which the composition is attached, but it seems that the particles of burning metal given off in the form of stars, sparks, and scintillations are so quickly consumed that the "sparklers" may be used even by children with little or no risk of personal injury.

These wares are handled principally by importers and dealers in toys and to some extent by importers and dealers in fireworks.

They were assessed for duty by the collector of customs at the port of New York under paragraph 193 of the tariff act of 1897 as articles or wares not specially provided for and composed in part of metal. The importer protested that the goods should have been assessed under paragraph 418 as "toys," at 35 per cent ad valorem, or at 30 per cent ad valorem under paragraph 421 as "fulminates, fulminating powders," or like articles, or at 20 per cent ad valorem under section 6 of the act as a nonenumerated manufactured article not provided for, or under paragraph 423 as matches at 8 cents per gross boxes.

The Board of General Appraisers decided that the "sparklers" or "sparklets" were not toys, fulminates, or fulminating powders, but articles composed in part of metal, not specially provided for, and therefore dutiable as assessed. The importers appealed to the United States Circuit Court for the Southern District of New York, and the appeal so taken has been certified to this court for further proceedings in accordance with the tariff act of 1909.

Counsel for the importers concede that the wares are not commercially known as toys, but insist that they should be assessed for duty as such, for the reason that "they are intended mainly for the use and amusement of children," and therefore fall within the common meaning and signification of the word "toy" as popularly understood.

The evidence produced on the hearing before the Board of General Appraisers is quite scant, not to say unsatisfactory, but considered in conjunction with the merchandise itself it may be fairly inferred that the sparklers are intended mainly for the amusement of children, and that they are used by children for that purpose. The contention, however, that such a purpose and such a use are of and by themselves sufficient to bring the goods within the popular meaning of the word "toy" must be accepted with some reservation. While some of the dictionaries and even some of the decisions define a toy to be any

article *used* by children for their amusement, a thing the *main purpose or use* of which is the amusement of children, any article *primarily intended* for the entertainment and amusement of children, we can not admit that these definitions accurately or correctly define a toy as commonly or generally understood, including as they do many things not popularly recognized as toys. Manifestly such definitions are altogether too broad and are open to the very serious charge of inexactness. In fact, failing utterly to so describe a toy as to distinguish it from other things, and especially from things which are not toys though serving to amuse children, they are wanting in the essentials of definition and are definitions only in name.

A toy is a thing to amuse children, but it does not follow that everything which amuses children or which enters into a device for their amusement is itself a toy. *Wanamaker v. Cooper* (69 Fed. Rep., 465; *Thanhauser v. United States* (159 Fed. Rep., 228).

Ping pong, originally a child's tennis, baseball, a development of the schoolboy game of "one old cat," handball, football, croquet, hockey, battledoor and shuttlecock, casino, checkers, and backgammon are all games played by and eminently fitted to amuse children. Indeed at an early period of their history some of them appear to have been exclusively children's games. In the popular mind, however, tennis and ping pong nets and rackets, balls and bats, croquet mallets and wickets, battledoors and shuttlecocks, playing cards, checkers, and checker and backgammon boards are not regarded as toys, for the simple and sensible reason that they are not the implements of games which are *exclusively* the diversions of children. *United States v. Strauss* (136 Fed. Rep., 185-187), reversing *United States v. Strauss* (128 Fed. Rep., 473); *United States v. Catus* (167 Fed. Rep., 532); *Thanhauser v. United States* (159 Fed. Rep., 228-232).

In common speech, and as popularly understood, a toy is essentially a plaything, something which is intended and designed for the amusement of children only, and which by its very nature and character is *reasonably* fitted for no other purpose. Although an article may be chiefly used for the amusement of children, if its nature and character are such that it is also reasonably fitted for the amusement of adults, or if it is reasonably capable of use for some practical purpose other than the amusement of children, it can not be classed as a toy unless it is affirmatively shown by the importer that it is so known and designated by the trade generally.

Magnesium for a brilliant white light, metal filings for sparkling, scintillating effects, gum to retard, and nitrate of barium to give a greenish tinge to the combustion are recognized by manufacturers of fireworks as valuable pyrotechnic agents, and these components of the merchandise under discussion are not infrequently used by such manu-

facturers as important elements in the creation of various kinds of pyrotechnic displays. In composition, in manufacture, and in the effects to be produced sparklers differ in no essential particular from fireworks—in fact they *are* fireworks, and just as capable of furnishing amusement to adults as are pinwheels, serpents, gerbes, Roman candles, or other devices which are made to please the eye with brilliant lights, colored fires, and dazzling scintillations. They are utterly lacking in the characteristics of the typical plaything, such as the doll, the Noah's ark, the top, and countless other things which may be used again and again to delight the mind of childhood, and which are fit for no other purpose. The toy is a plaything, and that implies something which may be played with, something which may serve the purpose of amusing the child more than once. A device which must of necessity be destroyed in order to amuse does not come within the category of a toy—a plaything. Since 1792, the year in which toys were first mentioned by name in a tariff act, many hundreds of articles have been classified as toys. In all the list of articles so classified, however, we have been unable to find one which of necessity had to be destroyed in order to amuse. The classification as toys of magic flowers, decalcomanias, water paints, and small candles used as a decoration on Christmas trees does not sustain the contention of counsel to the contrary. Magic flowers and decalcomanias are just as capable of amusing after as before their development. Their use does not end their power to please. The same may be said of water paints. *Blumenthal v. United States* (72 Fed. Rep., 48) did not pass on the classification of water paints, but on that of harmonicas, articles the power of which to amuse is evidently not contingent upon their destruction. The candle case is not in point, inasmuch as the decision in that case did not turn on the ordinary meaning of words, but on the proved fact that the goods were commercially known as “toy candles.” Fulminates and fulminating powders are highly explosive preparations resulting from the chemical combination of a metallic base with a nonisolated acid known as fulminic acid. The sparklers in character, composition, and purpose bear no resemblance whatever to fulminates or fulminating powders and can not be so classified. The fact that some of the sparklers are equipped at the end with a matchlike preparation in order that they may be readily lighted and so produce the effect for which they are manufactured does not justify their assessment for duty as matches, and *a fortiori* those not so equipped must be excluded from that category.

The decision of the Board of General Appraisers is affirmed.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

DELAPENHA v. UNITED STATES (No. 114). PEABODY v. UNITED STATES (No. 115.)<sup>1</sup>

STEM AND CARGO GINGER—SWEETMEATS.

Stem and cargo ginger does not lose its character as a sweetmeat when imported in bulk in casks, and when so imported was dutiable under paragraph 263, tariff act of 1897.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7018 (T. D. 30600).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers affirming an assessment of stem and cargo ginger as sweetmeats under paragraph 263 of the tariff act of 1897, the pertinent portion of which reads as follows:

Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem.

The ginger imported in these two cases was imported in bulk in casks, and is largely used for the manufacture of so-called glacé or crystallized ginger. The theory of the Government is that there is no substantial difference in character between ginger in casks and that imported in small crocks used as a sweetmeat, while the importers claim that in the condition in which it arrives it is unfit for consumption and should be considered a material from which the candied ginger is manufactured.

The importation consists of immature stems and roots of the ginger plant prepared while they are soft and succulent which can readily absorb the sirup in which they are preserved and packed.

The board found from the testimony of the witnesses and an inspection of the commodity that the ginger thus imported in casks is in fact edible, and also found that in some instances it is used as a sweetmeat in the condition in which it arrives. We think the conclusions of fact by the board are fully supported by the testimony and by an examination of the imported commodity represented by the sample produced in court. The evidence fairly establishes these facts, that the ginger in sirup when imported in jars is used and sold for table use as a sweetmeat; that cargo or stem ginger imported in casks is very similar to if not identical with jar ginger; that the cargo or stem ginger is used chiefly for the manufacture of crystallized ginger,

<sup>1</sup> Reported in T. D. 31116 (19 Treas. Dec., 1251).

which is accomplished by draining off the sirup and treating the stems with sugar; that the stems are used by confectioners in this manner, and the sirup drained off is also sold to manufacturers of cheap candy; and that in isolated cases cargo or stem ginger is sold to be retailed as a sweetmeat.

The evidence furnishes a reason why the cargo ginger is not sold generally as a sweetmeat, which is that a cask of ginger standing in a store is not a very tidy looking package. It is also apparent that the sale of this ginger imported in casks from the counter would involve the necessity of providing in the case of each individual sale a watertight package to contain the ginger in its sirup. We may take judicial notice that business is not ordinarily thus conducted.

The claim on the part of the importer that this ginger when imported in bulk is fermented and unfit for consumption is not found supported by the weight of the testimony, which satisfies us that it is only when by casualty the sirup has leaked out that the process of fermentation takes place.

We have presented, then, a case in which what is admittedly a sweetmeat if imported in a certain kind of container is, when another container is used, applied in the main to different use, and the claim is made that it should be differently classified. If a substance be a sweetmeat in a jar it is difficult to see why that same substance is not a sweetmeat when in a larger package, whether it be devoted to use as a sweetmeat or applied to another and different use. If a different classification were allowed the door would be open wide to an easy evasion of the tariff law. The article is in substance and composition a sweetmeat.

The case of *Schall v. United States* (T. D. 26007; 147 Fed. Rep., 760; 154 Fed. Rep., 1005) is, we think, entirely in point. In that case the commodity under consideration was marrons, which are large chestnuts put up in sirup. They were most largely used in making glacé marrons, bonbons, and other confections by dipping and coating them with various substances. They were, however, susceptible of use as a sweetmeat without such treatment. The Board of General Appraisers with some hesitancy held that "sweetmeats," while not a word of commercial meaning, was meant to reach articles intended primarily for use as delicacies in their imported condition. On appeal, the Circuit Court reversed this holding, and held that the importation was dutiable under paragraph 263, which holding was affirmed by the Circuit Court of Appeals. The case can not be distinguished from the present.

The term "sweetmeat" is a broad one and is defined by some lexicographers as a "sweet thing to eat." Clearly this importation comes within this definition. If we were more doubtful about the correct classification of this importation, we should be strengthened in the

view which we have expressed by the fact that under four or five successive tariff acts, covering a period of 25 years at least, ginger, corresponding to that represented by the present importation, has paid duty as sweetmeats.

The decision of the Board of General Appraisers is affirmed.

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MOORE v. UNITED STATES (No. 170).<sup>1</sup>

CORRUGATED GALVANIZED-IRON SHEETS.

An article of merchandise is dutiable in the condition it finds itself when imported; and corrugated-iron sheets that have been galvanized were not dutiable under paragraph 131, tariff act 1897, but were dutiable under paragraph 193 of that act, though not subject to the additional duty of two-tenths of 1 cent per pound under paragraph 132 of said act.—Declining to follow *Meurer Bros. Co.* (T. D. 26152) and *John D. Glück & Son* (T. D. 26866).

United States Court of Customs Appeals, November 30, 1910.

TRANSFERRED from the United States Circuit Court for the Northern District of California (T. D. 28910).

[Modified and affirmed.]

*William Denman* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise consists of corrugated-iron sheets. Duty was assessed upon them at 45 per cent ad valorem under paragraph 193 of the tariff act of 1897, with two-tenths of 1 cent per pound additional under paragraph 132.

Paragraph 193 reads as follows:

Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

Paragraph 132 reads as follows:

All iron or steel sheets or plates, and all hoop, band, or scroll iron or steel, excepting what are known commercially as tin plates, terne plates, and taggers tin, and hereinafter provided for, when galvanized or coated with zinc, spelter, or other metals, or any alloy of those metals, shall pay two-tenths of one cent per pound more duty than if the same was not so galvanized or coated.

The importers claim that the goods are dutiable at the specific rates provided for in paragraphs 131 and 132. They make the additional claim that, if the goods fall under paragraph 193, the imposition of additional duty for galvanization was unauthorized.

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<sup>1</sup> Reported in T. D. 31117 (19 Treas. Dec., 31117).

Paragraph 131 reads as follows:

Sheets of iron or steel, common or black, of whatever dimensions, and skelp iron or steel, valued at three cents per pound or less, thinner than number ten and not thinner than number twenty wire gauge, seven-tenths of one cent per pound; thinner than number twenty wire gauge and not thinner than number twenty-five wire gauge, eight-tenths of one cent per pound; thinner than number twenty-five wire gauge and not thinner than number thirty-two gauge, one and one-tenth cents per pound; thinner than number thirty-two wire gauge, one and two-tenths cents per pound; corrugated or crimped, one and one-tenth cents per pound: *Provided*, That all sheets of common or black iron or steel not thinner than number ten wire gauge shall pay duty as plate iron or plate steel.

The Board of General Appraisers overruled the protests, the importers appealed to the United States Circuit Court for the Northern District of California, and the case has been transferred from that court to this.

The case in its present state presents only questions of law, no evidence having been taken before the Board of General Appraisers, a stipulation having been filed in the Circuit Court, however, that a reference might be later had if the holding of the court should make testimony competent or available to the appellants.

The question of first importance is whether the importation was dutiable under section 131. The contention of the appellant is that under the terms of paragraph 131 corrugated or crimped sheets of iron or steel, without regard to value, are dutiable at  $1\frac{1}{10}$  cents per pound. This contention is based upon a consideration of the statute which makes the words "corrugated or crimped" and what follows relate back only to the words "sheets of iron or steel" and excludes any relation of those words to the other preceding language of the section. It is urged that corrugated or crimped iron or steel is commercially different in kind from common iron or skelp iron.

We think, at the outset, that the appellant misconceives the sense in which the word "common" is used in the first part of the section. "Sheets of iron or steel, common or black," should, we think, be construed as though it read "sheets of iron or steel, black, of whatever dimensions," etc. The word "or" as used in this place is used in the sense of "to wit,"—"sheets of iron or steel, common, to wit, black." This is not an uncommon use of the word, as is found by a reference to the authorities. See *Blumenthal v. Berkshire Life Ins. Co.* (134 Mich., 216;) also, *Anderson's Dictionary of Law* (p. 737), where it is said: "'Or' may be used in the sense of 'to wit'—explaining what precedes. The word 'or' in the statute is often used in the sense of 'to wit'—that is, in explanation of what precedes—and gives to that which precedes the same signification which follows it," citing authorities.

If we are correct in this, the words "sheets of iron or steel, common or black," define a class of sheets of steel under which corrugated or crimped would come, and it is, we think, clear that the other limitation placed upon the kind of common steel or iron which are intended to be covered by the paragraph, to wit, the limitation as to



the value, applies with equal force to all sheets of iron or steel provided for in the paragraph, including corrugated or crimped.

The exact question has not been before the courts for adjudication, but the contention has been made heretofore that the words "valued at 3 cents per pound or less" relate only to skelp iron or steel. This contention was overruled in *Hampton v. United States* (116 Fed. Rep., 109).

The importation in question, being of greater value than 3 cents per pound, does not therefore fall within paragraph 131, and as it is not specifically defined in any other paragraph, it was clearly dutiable under paragraph 193.

It is further contended that in fixing the value of the importation for the purpose of determining whether it falls under paragraph 131, its value before being galvanized should be ascertained. This contention is based upon paragraph 132, which imposes an additional duty upon sheets of steel or iron when galvanized, providing that the importer shall pay two-tenths of 1 cent per pound more duty than if the same was not so galvanized or coated. The claim of the protestant that there should be a valuation of this importation on a basis of something other or different than its condition at the date of its importation is so at variance with every provision of the administrative act and with the custom and practice which has obtained from the earliest history of tariff laws as to preclude such an interpretation, except when couched in the very clearest language. We find no such authority conferred on appraisers; on the contrary, the statute expressly requires that the appraisers shall appraise the goods in the condition in which they are at the time of their importation. See *Paturel v. Robertson* (41 Fed. Rep., 329); *Worthington v. Robins* (139 U. S., 337), and *Dwight v. Merritt* (140 U. S., 219).

The further contention is made that if paragraph 193 applies, then by its very terms paragraph 132 can not. There is much force in this contention. Paragraph 132 follows paragraph 131, in which a specific, definite finding as to the rate of duty which iron or steel sheets would bear is ascertainable, and the purpose of paragraph 132 was to add two-tenths of 1 cent per pound when galvanized, and this two-tenths of 1 cent per pound was said to be *more duty* than if the same was not galvanized or coated. This would be easy of ascertainment in a case coming within the provisions directly imposing a duty upon the sheets of iron or steel specifically. But it will be noted that the catch-all clause, paragraph 193, relates to all classes of importations not specifically provided for, including articles composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, which would include of necessity the metal employed in galvanizing, and upon articles of this class a duty of 45 per cent ad valorem is fixed. We think this contention should be allowed, and that the provisions of paragraph 132 can only be applied in cases where specific duty is in terms imposed upon the sheets of steel or iron, etc.

We do not overlook the cases (T. D. 26152 and T. D. 26866). It is true that in these cases the board took a different view of these paragraphs. What considerations were brought to the attention of the board does not appear. The language of the board was:

Being, however, galvanized, they are covered by the express terms of paragraph 132, and are subject to the additional duty of two-tenths of 1 cent per pound therein provided for galvanized-iron sheets.

We do not agree with this interpretation of the statute. Under paragraph 193 there is no means of ascertaining authoritatively what the duty on this importation would have been had it not been galvanized. The appraisal is of the goods as imported, and necessarily so, and we can not accept the view that in addition to the full duty of 45 per cent ad valorem upon the article, which perhaps *for the very reason* that it is galvanized is brought within the provisions of section 193, and is placed there for the purpose of fixing the appraisal, that the additional duty should be imposed of two-tenths of 1 cent per pound because of a *condition which resulted in bringing it within that paragraph*. It does not and can not be made to appear that this importation would be dutiable at all under paragraph 193 had it not been galvanized. It is a fair inference in the present case that it would not have been, as the value of the goods as found by the collector was only 3.68 cents per pound, and it may well be inferred that the sixty-eight hundredths of a cent would no more than cover the cost of galvanizing. But be that as it may, there is certainly no provision for any authoritative ascertainment of what would have been the dutiable value or the duty upon this importation had it not been galvanized.

The decision of the Board of General Appraisers is modified to the extent of directing a reliquidation, excluding the two-tenths of 1 cent per pound additional duty.

CAUVIGNY BRUSH CO. v. UNITED STATES (No. 281).<sup>1</sup>

PYROXYLIN OR CELLULOID ARTICLES.

Combs, boxes, and handles made wholly of pyroxylin or celluloid are dutiable under paragraph 17, tariff act of 1909.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7022 (T. D. 30634).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, and *Charles E. McNabb* (*John A. Kemp* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

The Cauvigny Brush Co., appellant, imported certain combs, boxes, and handles, which, it is admitted, were made wholly of pyroxy-

<sup>1</sup> Reported in T. D. 31118 (19 Treas. Dec., 1256).

lin or celluloid. They were assessed for duty under paragraph 17 of the tariff act of August 5, 1909, at 65 cents per pound and 30 per cent ad valorem.

Paragraph 17 of the act of 1909 reads as follows:

17. Collodion and all compounds of pyroxylin or of other cellulose esters, whether known as celluloid or by any other name, forty cents per pound; if in blocks, sheets, rods, tubes, or other forms, not polished, wholly or partly, and not made up into finished or partly-finished articles, forty-five cents per pound; if polished, wholly or partly, or if in finished or partly finished articles, except moving-picture films, of which collodion or any compound of pyroxylin or of other cellulose esters, by whatever name known, is the component material of chief value, sixty-five cents per pound and thirty per centum ad valorem.

The importers claim that the merchandise is dutiable as nonenumerated articles at 20 per cent ad valorem under paragraph 480, or if not under 480, then by similitude of material at 40 cents per pound or 45 cents per pound, under paragraph 17, just quoted. The importers argue that "as the articles are composed not in chief value of pyroxylin, but entirely of pyroxylin, they are not within the meaning of the provision under which they were assessed," and in support of this view call our attention particularly to the fact that paragraph 17 of the tariff act of 1897 provided for the assessment of duties upon articles of collodion or pyroxylin "if in finished or partly finished articles, and articles of which collodion or any compound of pyroxylin is the component material of chief value." We quote paragraph 17 of the act of 1897:

Collodion and all compounds of pyroxylin, whether known as celluloid or by any other name, fifty cents per pound; rolled or in sheets, unpolished, and not made up into articles, sixty cents per pound; if in finished or partly finished articles, and articles of which collodion or any compound of pyroxylin is the component material of chief value, sixty-five cents per pound and twenty-five per centum ad valorem.

Counsel for appellants say:

Paragraph 17 of the tariff act of July 24, 1897, provides for articles composed of pyroxylin and also articles composed in chief value of pyroxylin. Paragraph 17 of the act of 1909, under which the articles at bar were assessed, provides only for articles in chief value of pyroxylin. The inference is plain that Congress meant to change the law in regard to the classification of articles composed entirely of pyroxylin.

The difficulty with this argument lies in its conflict with the language employed by Congress. There are no words in either of the paragraphs quoted which exclude articles composed wholly of collodion; on the contrary, both sections expressly cover articles of which collodion or any compound of pyroxylin "\* \* \* is the component material of chief value," and both sections appear to have been drawn so as to cover collodion and all compounds of pyroxylin, when in cruder forms, when advanced beyond the crude but not made up into finished articles, and when finished. True, the

act of 1909 is more specific in its enumeration of articles, and makes definite changes in duties to be assessed, but we find nothing upon which to rest a conclusion that Congress in any language of the act of 1909 meant to narrow its scope by excluding articles which were included in the act of 1897 and are composed entirely of pyroxylin.

And as it is admitted that the interpretation put upon the act of 1897 has been that it includes articles made entirely of celluloid, we are all of opinion that Congress did not intend to change the classification by the slight change of language. In *re Guggenheim Smelting Co.* (121 Fed. Rep., 153). *Swayne v. Hager* (37 Fed Rep., 780). *United States v. Eschwege et al.* (98 Fed. Rep., 600).

These views dispose of the case, and lead to an affirmance of the decision of the Board of General Appraisers.

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WOOLWORTH *v.* UNITED STATES (No. 306.)<sup>1</sup>.

1. WHEN TWO OR MORE RATES OF DUTY ARE APPLICABLE.

Paragraph 481, tariff act, 1909, providing that if two or more rates of duty shall be applicable to any imported article, it is dutiable at the highest of such rates, will be construed in case of ambiguity in favor of the importer.

2. PAPER BOXES WITH SURFACE-COATED PAPER.

But where there is no ambiguity, the highest rate must be applied; and paper boxes covered with embossed surface-coated paper are dutiable under paragraph 411, tariff act, 1909.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7025 (T. D. 30642.)

[Affirmed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importers, F. W. Woolworth & Co., entered at the port of Boston certain merchandise consisting of paper boxes covered with embossed surface-coated paper. This merchandise was returned for duty by the collector of the port at the rate of 5 cents per pound and 30 per cent ad valorem, under paragraph 411 of the tariff act of 1909. The importers claim that the merchandise is properly dutiable at 45 per cent ad valorem under paragraph 418 of the act. On protest filed with the Board of General Appraisers, the assessment of the collector was affirmed, and the case is brought here for review.

Paragraph 411 reads as follows:

Papers with coated surface or surfaces, not specially provided for in this section, five cents per pound; if wholly or partly covered with metal or its solutions (except as hereinafter provided), or with gelatin or flock, or if embossed or printed, five cents

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<sup>1</sup> Reported in T. D. 31119 (19 Treas. Dec., 1258.)

per pound and twenty per centum ad valorem; papers, including wrapping paper, with the surface decorated or covered with a design, fancy effect, pattern or character, whether produced in the pulp or otherwise, but not by lithographic process, four and one-half cents per pound; if embossed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, five cents per pound and twenty per centum ad valorem: *Provided*, That paper wholly or partly covered with metal or its solutions, and weighing less than fifteen pounds per ream of four hundred and eighty sheets, on a basis of twenty by twenty-five inches, shall pay a duty of five cents per pound and twenty-five centum ad valorem; parchment papers, and grease-proof and imitation parchment papers which have been supercalendered and rendered transparent, or partially so, by whatever name known, two cents per pound and ten per centum ad valorem; all other grease-proof and imitation parchment papers, not specially provided for in this section, by whatever name known, two cents per pound and ten per centum ad valorem; bags, envelopes, printed matter other than lithographic, and all other articles composed wholly or in chief value of any of the foregoing papers, not specially provided for in this section, and all boxes of paper or wood covered with any of the foregoing paper, five cents a pound and thirty per centum ad valorem; albumenized or sensitized paper or paper otherwise surface coated for photographic purposes, thirty per centum ad valorem; plain basic papers for albumenizing, sensitizing, baryta coating, or for photographic or solar printing processes, three cents per pound and ten per centum ad valorem.

The contention of the importer is that the provision that all boxes of paper or wood covered with any of the foregoing paper should be assessed at 5 cents a pound and 30 per cent ad valorem is to be restricted to papers named in the section following the word "Provided." In other words, that the proviso only terminates with the section. The Board of General Appraisers held, on the contrary, that the proviso related to the class of papers previously enumerated, and was a limitation upon the previous enactment of the section, and that the proviso therefore ended at the first semicolon; that the provisions as to parchment papers, grease-proof papers, etc., were independent provisions; and that the words "any of the foregoing paper" were intended to include all paper previously named in the section.

The general rule is that a proviso should be construed as a limitation upon the enactment which it follows. *Lai Ming v. United States* (Court of Customs Appeals Report, *supra*, p. 5; T. D. 30770); *United States v. Dickson* (15 Pet., 141); and *Wayman v. Southard* (10 Wheat., 1). And while this rule is not an unbending rule, we think there is no difficulty in applying it to the present case. The section preceding the proviso had dealt with paper covered with metal or its solutions, and this proviso was inserted to fix a different rate upon paper of that character weighing less than 15 pounds per ream. What follows this appear to be very clearly independent provisions fixing a rate upon parchment paper, greased paper, etc. The language "any of the foregoing papers" is broad and we think was clearly intended to cover any papers previously mentioned in the section. The question is one upon which it would be obviously

difficult to find a case precisely in point, but we think the case cited by the Government *In re Cruikshank* (54 Fed. Rep., 676) is closely analogous.

The language of this section being to our minds entirely clear, and the importation being also covered by paragraph 418, the question arises as to which should be held controlling. Congress has seen fit to enact, by paragraph 481, that if two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates. This section should be resorted to only in a clear case. It is plainly the duty of the court, if there is any ambiguity in the provisions, to resolve the doubt in favor of the importer, and every known rule of construction will be resorted to to ascertain the legislative intent as between two provisions before invoking the paragraph named. But the present case is to our minds so clear that we must either ignore this provision of statute wholly or apply it.

The decision of the Board of General Appraisers will be affirmed.

### KLIPSTEIN *v.* UNITED STATES (No. 309).<sup>1</sup>

#### BIRCH-TAR OIL DISTILLED FROM WOOD.

It appearing from the evidence that the article imported was birch-tar oil distilled from the wood and used in dressing russia leather, to give an odor to the leather, the mere possible but undisclosed use of this oil for other purposes did not remove it from the operation of paragraph 568, tariff act, 1897, and it was nondutiable under that paragraph.

United States Court of Customs Appeals, November 30, 1910.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 30667).  
[Reversed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

The appellants in this case imported at the port of New York certain merchandise which was invoiced as "oil of birch" and returned by the appraiser in a special report as "birch-tar oil distilled from the wood and used in the manufacture of russia leather." The merchandise was assessed by the collector at 25 per cent ad valorem under paragraph 3 of the tariff act of 1897, which paragraph reads as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

The importer in due form and at the proper time protested against the classification and assessment made by the collector and claimed,

<sup>1</sup> Reported in T. D. 31120 (19 Treas. Dec., 1260).

among other things, that the merchandise was duty free under paragraph 568 of said tariff act, which paragraph reads as follows:

568. Grease, and oils (excepting fish oils), such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specially provided for in this act.

The Board of General Appraisers sustained the collector, and from its decision the importers took the appeal which is now the subject of consideration.

On the hearing before the board, Edward R. Morawetz testified on behalf of the importers that he was assistant purchasing agent and salesman for the firm of A. Klipstein & Co.; that as such he has had charge of all purchases and sales of birch-tar oil for the firm; that he has been with Klipstein & Co. some 10 or 12 years, and that during all that time birch-tar oil has been one of the articles of merchandise imported by the firm; that during said period of 10 or 12 years he has personally engaged in the sale of this merchandise at wholesale; that the merchandise is imported in small quantities; that it is sold by his firm to jobbers in tanning materials and tanners of leather exclusively; that he has never known it to be sold in the markets of the country to anybody else; that he knows that it is used for dressing leather to give it an odor of russia leather; that he knows of no other use to which it is susceptible; that he knows nothing as to the origin of the oil or method of producing it; that he has no knowledge of it other than that afforded by his 10 or 12 years' experience in handling it as purchasing and sales agent of the importers; that he knows from his personal experience that tanners can use the oil for no other purpose than that of giving to leather the odor of russia leather; that he never heard of its being used as a drug or that it is one of the drugs mentioned in the Pharmacopœia; and that in his opinion it could not be used as a drug because the odor is too strong. The testimony of this witness, the special report of the appraiser to the effect that the importation is "birch-tar oil, distilled from the wood and used in the manufacture of russia leather," and the chemist's report, stating that the "material is wood-tar oil, obtained by the destructive distillation of wood, probably birch wood," constitutes all the evidence submitted to the board. The board held that the report of the appraiser was substantially confirmed by that of the official chemist, and that the evidence of the only witness produced on the part of the importers was not sufficient to establish that birch-tar oil was *commonly used in stuffing or dressing leather or that it was fit only for such use.*

The only question in this case is, was there sufficient evidence before the board to establish at least *prima facie* that birch tar oil is used as a dressing for leather and for no other purpose. The decision of this question depends upon the weight and value which should be given to

the testimony of one unimpeached witness when considered in connection with the chemist's report and the special report of the appraiser. We think that the testimony was sufficient at least to throw the burden on the Government of showing that it was not used as a dressing for leather or that that was not its only use. Had the report of the appraiser or that of the chemist been to the effect that the importation was used for some other purpose than the stuffing or dressing of leather there might have been some force in the claim that the presumption which obtains in favor of such reports and the classification of the collector had not been overcome by a preponderance of evidence. That was not this case, however. Indeed, if anything, the report of the appraiser is corroborative rather than contradictory of the testimony of the witness. That testimony was, it is true, negative in character as to whether the oil might not be put to some other use than that of dressing leather, but it was direct, affirmative, and positive, first, that it was used for dressing leather in order to give it the distinctive odor of russia leather; second, that in all his years of experience with the oil the witness knew of no other use for it; and, third, that it was imported by his firm to be sold and was sold exclusively to tanners and jobbers in tanning materials. The mere fact that the merchandise might *possibly* have some other use than that specified is not sufficient of and by itself to overcome or counterbalance the probative effect of the sworn declaration of a single witness of ten years' experience with the goods that they have but one use because he knows of but one use for them. *United States v. Wells* (77 Fed. Rep., 411). Especially must this be true when the official report of the appraiser mentions but one use for the importation and that use the one testified to by the witness as the sole use of which he is aware. Importers and merchants are naturally desirous of increasing the number of their customers and the demand for the goods in which they deal, and as they have every incentive for knowing the uses to which their wares are or may be put it is only fair to assume, at least *prima facie*, that the only uses known to them are the only uses of such wares. Of course the importers in this case might have produced other importers of the oil, tanners, jobbers in tanning materials, and the sworn declarations of the manufacturers of the merchandise to corroborate the testimony of their purchasing and sales agent, but apart from its corroborative effect such testimony could have had no higher probative value than that of the single witness produced. After all is said and done, a thousand witnesses, assuming that they were favorable to the importer, could have testified to nothing more than that birch-bark oil was used as a dressing to give the characteristic odor to russia leather, and that so far as they were concerned they *knew* of no other use for it. If the testimony of the importers' witness had been contradicted or impeached in any way, the evidence of additional witnesses would have been very



valuable, not to say necessary, but in the absence of such impeachment or contradiction the sworn declaration of one was as effective as that of a number. The cases of *Swan v. Finch* (113 Fed. Rep., 243) and *Train v. United States* (113 Fed. Rep., 1020), cited by the Government, are not in point. In *Swan v. Finch* it was affirmatively shown that the oil had other uses than that of dressing leather, among others that of making blacking. Moreover, the oil in that case was a fish oil, and the importers failed to sustain their contention that it had a commercial designation which took it out of that category. In the case of *Train v. United States*, gunny cloth or cotton bagging was claimed free of duty because it was fit only to be converted into paper. It appeared, however, that gunny cloth and cotton bagging of the character claimed to be free of duty had other uses than that of conversion into paper, among them the making of mattresses, sweat pads for horses, lining for cheap coats, plumbers' oakum, and the making or repairing of coverings for cotton.

Scientific works on leather making seem to confirm the contention of the appellants that the oil is used to give the characteristic odor to russia leather, and dictionaries and encyclopedias which mention the oil give that as its use and *mention no other*. The *Principles of Leather Manufacture*, a scientific work on leather making by Proctor, has this to say at page 250 of birch bark and of birch tar oil.

By far the most important use of birch bark in tanning is to produce the birch-bark tar used to give scent and insect-resisting power to "Russia" leather (*Youft*; Ger. *Juchten*). The outside bark consists of thin layers of cork, often white, with a crystalline deposit of betulin, which, when distilled, yields the odorous oil. The distillation is a dry one, and tarry products accompany the true oil, and at first give a strong empyreumatic smell to the leather, which it loses by keeping, while the true "Russia" odor remains.

Sadtler's *Organic Chemistry* (p. 334), speaking of russia leather, says:

This variety is peculiar in its characteristic odor and ability to withstand dampness without any tendency to mould, both of which qualities it owes to the currying with the empyreumatic oil of birch bark. \* \* \* The birch-bark oil is rubbed into the flesh side of the tanned skins with cloths, care being taken not to apply so much as to cause it to pass through and stain the grain side of the leather.

The *Standard Dictionary*, referring to the birch tree, says of the European or white birch (*Betula alba*):

It is put to many uses, especially in Russia, where its oil is used in dressing russia leather.

The *New English Dictionary* (Murray) describes birch oil as—

An oil extracted from the bark of the birch and used in the preparation of russia leather, to which it gives its smell.

The *New International Encyclopedia* says:

*Russia leather* is much valued for its aromatic odor which it derives from the peculiar oil of the birch bark used in tanning it. The fact that this odor repels moths and other insects renders this leather particularly valuable for binding books; a few books bound in russia leather being effective safeguards against insect enemies in a library.

It was hinted by a question during the hearing that birch-bark oil might be used as a drug. The Pharmacopœia of the United States, which has been given by the pure food and drugs act an official status for the strength, quality, and purity of drugs, does not mention birch-bark oil as a drug or as an element of any medicinal preparation. It does contain, however, oil of *sweet birch* (*Betula lenta*), which is essentially the same as the oil of wintergreen and which is often erroneously spoken of as the source of "russia" oil, which is a distillation from the bark of the *white birch* (*Betula alba*).

The United States Dispensatory states that birch-bark oil, which appears to be identical with the importation, is used as a lotion for eczema and other skin diseases. In view of the fact, however, that the birch-bark oil used to give the odor to russia leather appears to be often confounded with the oil distilled from the *Betula lenta* or sweet birch (see Principles of Leather Making, Proctor, p. 250), and in view of the fact that the preparation set out in the Dispensatory is not included in the Official Pharmacopœia, and in view of the further fact that the Dispensatory itself says that many substances have been included in it which are not recognized as official by the Pharmacopœias, and solely because they may have some "lingering remains of a former reputation," it can hardly be assumed that this is a practical use of the oil. Possibly there is that use of it, however, but if so it should have been shown by the Government by competent evidence.

The decision of the Board of General Appraisers is *reversed*.

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### BURR v. UNITED STATES (No. 28).<sup>1</sup>

CONCRETE MUGUET DE MAI—ENFLEURAGE GREASE.

Muguet de Mai, shown by a preponderance of testimony to contain no essential oil, is not fluorescence valley lily, but enfleurage grease, and as such by paragraph 626, tariff act of 1897, was not dutiable.—United States v. Ungerer (T. D. 28210) distinguished.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 28448).

Transferred from United States Circuit Court for the Southern District of New York.

[Reversed.]

Comstock & Washburn (*J. Stuart Tompkins* of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

This case involves the proper classification of certain merchandise which was invoiced as "Concrete Muguet de Mai." The collector

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<sup>1</sup> Reported in T. D. 31183 (20 Treas. Dec., 17).

at New York regarded the article as within a combination of oils, and assessed duty at 25 per cent ad valorem, under paragraph 3 of the act of July 24, 1897, which reads as follows:

Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, \* \* \* twenty-five per centum ad valorem.

The importer contended that the merchandise was entitled to free entry under paragraph 626 of the tariff act referred to, which admits "enfleurage grease" free of duty.

After a hearing the Board of General Appraisers overruled the protest of the importer and sustained the action of the collector. The board based its ruling upon the ground that the merchandise was in all essential particulars the same as the "fluorescence valley lily," which was involved in the case of *United States v. Ungerer* reported in T. D. 28210, wherein the Circuit Court for the Southern District of New York held that fluorescence valley lily was liable to duty at the rate of 25 per cent ad valorem under the hereinbefore quoted provisions of paragraph 3 of the tariff act of 1897. The importers ask a reversal of the decision of the Board of General Appraisers.

The testimony of the importer, who is a dealer in perfume, but who is not a chemist, is to the effect that the article under consideration is manufactured by what is known as the volatile solvent process, whereby the odoriferous principle from the flowers is taken out; that muguet de Mai is a combination of such odors alone; that an essential oil is the product of the process of distillation, but that none of the ingredients which enter into muguet de Mai are produced by a process of distillation. The witness said, however, that an essential oil could be produced by expression, and cited as an instance of essential oil attar of roses. Witness said that the concrete muguet de Mai is a combination of lily of the valley odor, which, in turn, is a combination of lily or lily of the valley and muguet odors; that there are as many as five flowers used in the combination; that he has two odors, May lily and muguet de Mai, one liquid and the other solid; that in the one case the solvent is made by taking out the inert vegetable waxy matter, and in the other the odoriferous principles are extracted with a much smaller percentage of the inert vegetable matter. Witness described the volatile solvent process as in its first development involving the use of "one solvent used with all petroleum ether," but as this process has developed combinations by other solvents than petroleum ether have been made, which, he said, had become necessary because the characters of the different flowers vary, and it is desirable to obtain all the odoriferous principle of each flower in as perfect condition as possible. He said that the volatile solvent process differs from the enfleurage in that the enfleurage is what is termed "fixed

solvent process;" that in the manufacture of muguet de Mai each of the odors is manufactured by the volatile solvent process from the bloom of the flowers. He described how the odor of the rose is obtained by the volatile solvent process, saying:

The rose is put in the volatile solvent, the bloom. This is put in the volatile solvent exactly as it is put in the fixed solvent, put bodily into the fixed solvent. The volatile solvent takes out the odoriferous principles of the rose as does the fixed solvent. Then the solvent is odorized \* \* \* taken off.

He said that in the process a retort is used, with vacuum pressure, and the article imported is the accumulation; that the products of the fixed solvent and volatile solvent process, finished, are practically the same, in so far as the odor is concerned; that their liquid flower essences, made by the fixed solvent, are practically of the same character as the essence in the liquid form; that the fixed solvent process embraces not only animal grease, but vegetable oils, which are used as fixed solvents for the mixture of odors from the flower. In another part of his testimony the witness repeated that none of the odors in the muguet de Mai under examination were made by distillation, but that he could not say at what point the combination of different odors entered, but that from his understanding, during the process of making the odors, principally of the rose, upon reaching a certain stage of development the partially finished material is put together, thus creating a second stage of the process, and that then they are carried along through the machine until the muguet is produced; that the process was virtually one.

The importers called Mr. Crane, a professional chemist of years of experience in the perfume industry and the preparation of synthetics or bodies made from other bodies for use in the perfume industry. This witness said he had made analytical tests of the merchandise involved in this investigation for the purpose of ascertaining whether the soluble portion contained essential oils, but that he found none were present. Witness said that he took a portion of the filtered alcoholic solution and examined it in a tube of 100 millimeters in length in a polariscope. He found a rotation of approximately one degree; then he removed the alcohol from another portion of the alcohol soluble material, dissolved the residue in ether shaken with a water solution of potassium hydrate, and treated the water layer with acid to neutralization, and as a result he found no appreciable quantities of phenolic bodies liberated; that there were practically no terpenes present, although essential oils nearly always contain a fairly large proportion of terpenes or phenolic bodies. Witness found between 5 and 6 per cent of grease which was entirely saturated with the odoriferous principle of flowers. He took the contents of a bottle which had been used in the case of *Ungerer v.*

United States, heretofore referred to, and found no appreciable quantity of grease present, upon a test made by dissolving in alcohol and chilled.

It was the opinion of the witness that the merchandise called fluorescence valley lily, involved in the Ungerer case (*supra*), was not of the same physical characteristic as the concrete muguet de Mai involved herein, the difference between them being in specific gravity, in mobility, color, and composition. One, said the witness, contains fat, the other does not; and he believed that the muguet de Mai was enfleurage grease, because it is a grease or greasy body containing the odoriferous constituents of flowers. It was also the opinion of Mr. Crane that essential oils usually are free from fat, and more mobile and more fluid in character than the muguet de Mai. He defined an essential oil under a trade definition as "a body derived from a vegetable source by expression, direct distillation, or steam distillation," saying that the portion of the vegetable which contains the oil is expressed, and thus essential oil is given.

Upon being asked what was the point, if any, at which a mixture ceases to be an essential oil, he said that he did not know that an essential oil would ever lose its character; that if you took a whole lemon and squeezed it and simply allowed the resulting liquid to stand, pure oil of lemon would come floating to the top and lemon juice would be beneath, and you could remove the essential oil of lemon by skimming it off, but that he would not call a mechanical separation a process of refinement. He said that sometimes in obtaining essential oils the process of distillation or expression contributes to the formation of essential oil; that the mother substance is always present in the original vegetable matter, but that essential oil is something obtained from the plant tissues by the process employed. It was Dr. Crane's opinion that some essential oils were purer than others, each oil having its own test; that it was hard to say what essential oil was in a popular sense, but that commercially it is the result of distilling odoriferous bodies, and that as used in the perfumery trade, an essential oil must be either expressed or distilled.

Theodore Ricksecker, an expert perfume manufacturer, had testified in the Ungerer case. It was agreed that his testimony in that case should be received as evidence in this case. He defined enfleurage grease as a vehicle of grease that absorbs odors, odoriferous principles, and said "the grease may be solid or liquid or any way, so long as it is enfleurage, which means saturated with flowers." This witness said he was the author of the title in the tariff of 1897, and that prior to 1897 as a commercial term enfleurage grease was applied

to pomade, which was made of odoriferous grease impregnated with the odoriferous principles of flowers, and sold in the different markets of the world to be extracted by alcohol; that after the extraction by alcohol of the odor, the residue would cease to be enfleurage grease. He explained that enfleurage grease was the term merely applied to the vehicle combined with the impregnation of the odors before the manufacturing of the combinations commenced; that generally the material out of which enfleurage grease is made is anhydrous lard. The manufacture was by spreading a thin layer of anhydrous lard on a glass tray, then by putting a layer of flowers, and then another layer of fat, and another layer of flowers; that they were then allowed to remain until the fat had absorbed the perfume, and that when the perfume was exhausted, the flowers were taken out and another application of flowers was had, and that this was repeated until the desired strength of enfleurage grease was obtained. He said that the resulting combination of the fragment part of the flower and this grease was what is known as enfleurage grease.

He described the fluorescence valley lily involved in the Ungerer suit as containing several ingredients advanced beyond the state of enfleurage grease, and that he believed the article contained ylang-ylang, and had nothing to do with enfleurage grease. Witness said, however, that he did not make enfleurage grease himself, but he was familiar with the use of it in the manufacture of perfumery. Owing to some uncertainty of determining just what exhibit witness had before him when he testified, we are unable to understand fully the references of the witness to the greases and oils in sample, but we take it he meant to have it accepted as his opinion that the bottle in the Ungerer case contained a combination of enfleurage grease, with probably a little oil to strengthen it, and that it would be more correct to say that article was a combination of greases and oils than to say that it was a manufacture of enfleurage greases and oils.

D. J. Booth, a chemist of many years' experience, and whose testimony in the Ungerer case was used, said that enfleurage grease was made as Mr. Ricksecker had described it. He added that the grease was washed with alcohol, and that when that washing was concluded, it ceased to be enfleurage grease, and carried the essential odors of the flowers. He said there was another process called the solvent process, where the odors of the flowers were dissolved out by the volatile solvent—ether; that evaporation off into a lower temperature occurs in using this process, and thus a concrete is constituted, which is fortified by ylang-ylang and linanol. Ylang-ylang and linanol, witness said, are obtained by distillation. Witness admitted, however, that no absolute test could be made unless analysis was had.

The evidence of the importer is not altogether clear, but we are impressed by the testimony of Dr. Crane, which is reasonable and is not contradicted in any material respect. Particular stress must also be given to his statement to the effect that the fluorescence valley lily which was involved in the Ungerer case is, in the essential particulars named by him, different from the concrete muguet de Mai to which inquiry in this case is addressed. Nor is there any real conflict between Dr. Crane and Mr. Ricksecker in the specific descriptions of what constitutes enfleurage grease. Both say it is a grease saturated with flowers, that it may be solid or liquid, and that it is a grease or greasy body which contains the odoriferous constituents of flowers.

These gentlemen may have differed in their more general deductions with respect to the character of the respective articles testified to by them, yet when we consider that Dr. Crane was a technical expert, and stated his premises and reasons from an apparently accurate standpoint, and advanced his opinion upon careful analysis of the particular article involved in this suit, and that his analysis was not disputed by any chemist, we are disposed to believe that it gave to the importers that decided weight of evidence which permitted of no sound conclusion other than that their protest as to the muguet de Mai was well founded. We gather, too, that an enfleurage grease does not necessarily lose its character, although it is a mixture of several greases, bearing odors of flowers, provided, of course, the grease remains a crude product which can only be used when imported by washing or treatment which will get out of it the odor principles of flowers. *Pickhardt v. Merritt* (132 U. S., 257); *United States v. Brownell* (166 Fed. Rep., 1022); *United States v. Schering* (163 Fed. Rep., 246); *United States v. Morningstar* (168 Fed. Rep., 541).

Some decisions of the courts and rulings of the Treasury Department are cited by counsel for the Government, but inasmuch as they relate to articles of different composition, they are not directly relevant.

Our judgment is that, under the weight of uncontradicted evidence, the article involved in the Ungerer case is not essentially similar to that involved herein, and that therefore the record does not present an instance of a mere conflict of evidence as to a question of fact. We have then a fact established by expert analysis not inherently false or unworthy of belief.

It follows that the basis of comparison used by the board was inaccurately employed, and that their conclusion must be set aside as without sufficient evidence to sustain it.

*Reversed.*

SAITO *v.* UNITED STATES (No. 142).<sup>1</sup>

## 1. IMITATION PONGEE SILK.

Imitation pongee silk, in chief value of cotton, was dutiable under paragraph 311, tariff act of 1897.

## 2. A JAPANESE CHAMBER OF COMMERCE CERTIFICATE.

A certificate of the Yokohama Chamber of Commerce as to the value of a commodity imported from Japan to the United States is admissible under treaty regulations as evidence before the Board of United States General Appraisers.

## 3. JUDICIAL NOTICE TAKEN.

Judicial notice will be taken that with the present means of intercommunication between the various countries of the world the price of a commodity like cotton does not greatly fluctuate or differ in different countries.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from a decision of the Board of United States General Appraisers (T. D. 29848).

[Affirmed.]

*Brown & Gerry*, for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This appeal concerns an importation of imitation pongee silk from Japan, assessed for duty under paragraph 387 of the tariff act of 1897. The goods were returned by the appraiser as manufactured silk and cotton, yarn-dyed, colors, silk under 30 per cent, as goods weighing from 1½ to 8 ounces per square yard, and the duty was assessed at 90 cents per pound.

The protest sets forth that the goods weigh not less than 1½ and not more than 8 ounces per square yard and contain not more than 20 per cent in weight of silk and were in the gum, and dutiable at 50 cents per pound, and alternatively that if not dutiable as aforesaid, they were dutiable at only 60, 65, 75, or 80 cents per pound as answering the conditions attached to those rates under said section, or were dutiable under the last clause of said paragraph at only 50 per cent ad valorem, or if not as aforesaid, were dutiable under paragraph 391 (as manufactures) at 50 per cent ad valorem. Paragraph 387 fixes a duty of 90 cents per pound on dyed silk other than black not containing more than 30 per cent in weight of silk.

On the hearing before the Board of General Appraisers it was found that the silk weighed between 1½ and 8 ounces per square yard, the goods were not dyed, and had been boiled off. It was found that the goods were not dutiable as assessed, but it was further held that they were not dutiable as claimed by the importer, for the reason that the goods were in chief value of cotton and not of silk and therefore dutiable under paragraph 311. The case must turn upon the

<sup>1</sup> Reported in T. D. 31184 (20 Treas. Dec., 22).



question as to whether there was competent evidence on which to base the finding that the goods were in chief value of cotton, and whether such evidence was sufficient to overcome that offered by the protestant.

Considerable discussion has been had and briefs filed upon the question of whether the certificates given by the Chamber of Commerce of Yokohama are admissible as evidence of the value of the product on the hearing before the Board of General Appraisers. The commercial agreement between this Government and Germany provided, among other things, that the certificates as to value issued by German chambers of commerce should be accepted by appraisers as competent evidence and be considered by them in connection with such other evidence as might be adduced. By an order of the Treasury Department (T. D. 29150) the provisions of the German agreement were extended to Japan pursuant to the provisions of the most-favored-nation clause in the treaty of commerce and navigation between the United States and Japan concluded November 22, 1894.

Under the administrative act of 1890, section 14, on appeal to the Board of General Appraisers, it became the duty of the collector "to transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein \* \* \* except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act."

It would seem that testimony competent before the collector is likewise competent before the Board of General Appraisers, and that these certificates were made competent by the treaty regulations.

But if this testimony be wholly ignored, the goods having been assessed as in chief value of silk, the presumption would be in favor of the correctness of the classification, except in so far as it is shown to be incorrect. This leads to the question of whether the evidence adduced by the Government to show that the chief value of these goods was cotton was competent or sufficient. An examination of the record discloses that the finding that the chief value of the goods was of cotton was based upon the testimony of the analyst in charge, who reported cotton to largely preponderate in value. The board, dealing with the question here involved, said:

Counsel for the importer urges that these analyses are entitled to little weight, for the reason that the analyst has adopted European prices of yarns in his calculations and on cross-examination was shown to have no definite knowledge of the

values of yarns in Japan, where these goods were manufactured. This might be a reason for rejecting the analyses if the difference in the value of the component materials was shown to be slight, although it is well known that silk and cotton yarns of the various grades and qualities are regularly quoted in the principal markets of the world, and that at no time is there any great variation in the prices in the several markets for the same quality and grade of yarn.

We agree with the Board of General Appraisers that the objection urged by the importer's counsel goes rather to the weight of the testimony than to its competency. We may take judicial notice that with the present means of intercommunication between the various countries of the world the price of a commodity like cotton does not greatly fluctuate or differ in different countries, and that when the disparity is so great as in the present case it may be fairly found as a fact that the discrepancy is not due to a variation in markets.

It follows that as the goods are not dutiable under the paragraph named by the importer in his protest, the board was right in rejecting his claim.

The decision is *affirmed*.

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BRADLEY MARTIN, JR., v. UNITED STATES (No. 246).<sup>1</sup>

RESIDENCE—PERSONAL EFFECTS.

Apart from any question of legal citizenship, one who is in good faith residing and making his home abroad, according to the evidence, and who visits the United States with no intention of remaining here, is entitled to bring in his wearing apparel—his personal effects—free of duty.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23265 (T. D. 30601).

[Reversed.]

*Davies, Stone, Auerbach & Cornell* (Harold Harper of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Wm. K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

The appellant, Bradley Martin, jr., brought with him into the United States certain wearing apparel and personal effects. Notwithstanding the objection of the appellant, the collector assessed duty. Upon appeal to the Board of General Appraisers, the protest of the appellant was overruled. Appellant asks a reversal.

The case is controlled by paragraph 709 of the tariff act of 1909, which reads as follows:

709. Wearing apparel, articles of personal adornment, toilet articles, and similar personal effects of persons arriving in the United States; but this exemption shall only include such articles as actually accompany and are in the use of, and as are necessary and appropriate for the wear and use of such persons, for the immediate

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<sup>1</sup> Reported in T. D. 31185 (20 Treas. Dec., 24).

purposes of the journey and present comfort and convenience, and shall not be held to apply to merchandise or articles intended for other persons or for sale: *Provided*, That in case of residents of the United States returning from abroad, all wearing apparel and other personal effects taken by them out of the United States to foreign countries shall be admitted free of duty, without regard to their value, upon their identity being established, under appropriate rules and regulations to be prescribed by the Secretary of the Treasury, but no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return.

The contention of the appellant is that the board erred in its holding that he was a resident of the United States at the time of his arrival at the port of New York on October 9, 1909, and therefore that duty was properly assessed. The substance of Mr. Martin's testimony is that his parents are citizens of the United States; that he is a married man, 36 years of age; that in 1881 he went abroad for the summer; that he stayed abroad five years; that at the time of his arrival in New York, in 1909, he resided in London and in Scotland; that at the time of his marriage, in 1904, he leased a place of his own in Scotland but kept his residence with his father in London; that he married a lady who had resided in Scotland for about nine years before their marriage; that in 1890 he went to Christ Church, Oxford, and remained there for about four years; that thereafter he went to the Harvard law school, took a three years' course there, and was again abroad from 1897 to 1904; that his custom was to come to the United States for two or three months each year in order to transact business for his father; that since 1906 he has had a shooting place in Scotland; that he has a floor in his father's house in London and keeps his own furniture there; that he always claimed London to be his residence; that he paid income tax in England during the years 1907 and 1908; that he never voted in the United States; that when he came to New York in October, 1909, he had no intention of remaining permanently in America but intended to return to Great Britain at the end of a short period; that until 1881 he resided in New York at the house of his father; that his wife has a life interest in a house in New York; that this interest was presented to her by her father; that appellant and she live in it now; that in 1908 appellant was in the house about three weeks, and that he and his wife temporarily occupied the house at different times, about the dates of the birth of his children. Appellant also said that since his arrival in the United States the situation had changed and that he had gone into business in New York on December 9, or two months after his arrival. We quote as follows from the concluding part of the appellant's testimony:

Q. When do you expect to return to England?—A. Now, the situation has changed since I came in. I have now gone into business here. I went into business on December 9, two months after coming in.

Q. When did you change your mind?—A. About two days before I went into business.

Q. Where is your place of business?—A. I am in the banking business.

Q. Did you have any intention of going into the banking business before you left England?—A. No intention until about two days before I went in. I went in on December 9, and about two days before. My father used to be taxed here, and he had his taxes changed to England, and the principal reason for his changing was my sister marrying abroad, and my living abroad; so he changed his residence before I became of age, so I never had any official residence here.

Upon this evidence, which was all there was in the case, the board held that it was "not convinced" that the protestant was not a resident of the United States when he arrived in New York. Accordingly, the property of the appellant was regarded as dutiable.

Let us examine the statute. By its language, which exempts wearing apparel, articles of personal adornment, toilet articles, and similar personal effects of persons arriving in the United States, and limits the exemption only to such articles as are necessary and appropriate for the wear and use of "such persons" for the immediate purposes of "the journey and present comfort and convenience," the evident object to be accomplished was to relieve travelers, not intending to reside in the United States, from payment of duties upon such apparel and personal effects as they may bring with them for the convenience of travel and mere sojourn in the United States.

However, to the general words of the statute there is a restraint by which we find its scope restricted to nonresidents. Residents of the United States returning from abroad are specially referred to. As to them the particular intent of the law finds its expression in the proviso, whereby all of the personal property of such persons, property taken by them out of the United States, shall be admitted free of duty, but no more than \$100 in value of articles purchased abroad. The apparent policy of the legislation exempting a nonresident traveling to, but not residing in, the United States, and not importing merchandise for others, or coming with a view to engage in commerce in the United States, was doubtless to facilitate travelers who are merely sojourning within the United States. Such persons, arriving in the country, neither put their personal property into trade markets nor compete with the manufacture or industry of the United States. Presumably, their effects all come from abroad and will be taken back, while the resident who comes home to remain introduces what things he brings with him into the mass of property in the country, and therefore must pay for such things as he may have purchased abroad, provided their value exceeds \$100.

It is urged by the respondents' counsel that the exemptions of the statute can not be claimed by citizens of the United States who are residents abroad and who arrive in the United States. We do not so interpret the law.

The exemption of property of "persons" arriving in the United States is very broad. There is no limitation with respect to citizen-

ship or other status. All inquiry becomes immaterial except that which is directed to ascertaining whether or not the person arriving in the United States and having the wearing apparel and articles of personal adornment and personal effects resides in the United States, and is on a journey to and in the country with the intention of returning to a foreign land, and whether the things he brings with him are necessary and convenient for the immediate purposes of his journey and the comfort of the person himself while in the United States. If there were any doubt that this is the correct interpretation, confirmation is found in the proviso, where the emphatic use of the words "residents of the United States returning from abroad" at once contrast the cases of such persons with those of others meant to be described in the unrestricted antecedent language. It follows that persons who are residents, being those who are specially excepted by the proviso, "persons arriving" generally provided for and not excepted must be nonresidents; that is, persons who, without regard to legal citizenship, are in good faith living and making their homes abroad with no intention of returning to live in the United States. In *United States v. One Pearl Necklace* (111 Fed. Rep., 164), cited by appellee, the court of appeals of the second circuit referred to the exemptions of a similar statute as made according to citizenship, but we hardly think that the word "citizen" was used by the court in a sense of distinction from the word "resident." The court was explaining the status of the foreigner and the resident without necessity for decision as to the exact meaning of the word "resident."

Passing to the evidence, we are of opinion that the appellant has sustained the burden of proving that when he arrived in the United States he was not a resident of this country. He had been abroad practically the whole of his life, had maintained a household and claimed his residence there, had paid income taxes in England, had never claimed the right to vote in the United States, and appears to have had no intention of remaining herein when he arrived at New York in October, 1909. His story is direct, without evasion, and wholly consistent with the claim that though a citizen of the United States he was a bona fide resident of England, coming to the United States merely to visit or attend to business matters for his father, who had for years been also a resident of Great Britain. The fact that, some two months after his arrival in New York, owing to circumstances he changed his plans and concluded to remain and to become a resident of the United States does not affect the case, except in so far as such facts may bear upon the probability of the truth of the statement of the appellant that he was a resident of England and had no intention of remaining in the United States when he arrived. We grant that if the acts of appellant subsequent to his arrival had been accompanied by circumstances which tended to show that

remaining was but the execution of an intent to remain which existed in his mind at the time of his arrival, then it could be said that appellant was not only not a nonresident at the time of his arrival, but was guilty of perjury in his statements before the Board of General Appraisers as well as of a fraud upon the laws of the United States. But aside from the fact itself that appellant had gone into business, coupled with his statement that after his arrival he had concluded to remain in the United States, there is nothing which tends in the least to affect the reasonableness and apparent truth of his statements concerning his nonresidence, and intention to return, when he arrived. And it is the intention at that time, and what his residence was when he arrived, that become the crucial points involved.

We do not overlook the importance and necessity for customs officials to search for external facts by which they may gather the intent of those who claim to be nonresident travelers, entitled to the exemptions of the statute under consideration, for doubtless it is only by extreme vigilance that fraud is prevented. On the other hand, a witness is presumably truthful, and if upon the uncontradicted external facts, themselves not unreasonable or incompatible with strict honesty of conduct, the only deduction which is consonant with such presumption is in favor of the person arriving, it becomes the duty of the courts to sustain his statement rather than to discredit it.

*Reversed.*

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HORSFIELD *v.* UNITED STATES (No. 248).<sup>1</sup>

FROZEN HEN'S EGGS IN TIN CANS.

Hen's eggs, having their whites and yolks mixed in exact proportion, the white and the yolk of each egg being thrown into a common receptacle and the total contents being placed in hermetically sealed tin cans and frozen for shipment, are dutiable under paragraph 256, tariff act of 1909, as eggs not specially provided for.—*Sun Kwong On v. United States* (143 Fed Rep., 115) approved.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23479 (T. D. 30691).

[Affirmed.]

*Joseph G. Kammerlohr* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

In March, 1910, the appellant imported from China and entered at the port of New York the merchandise which is the subject of this

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<sup>1</sup> Reported in T. D. 31186 (20 Treas. Dec., 28).

appeal. It was assessed by the collector for duty under paragraph 256 of the tariff act of August 5, 1909, which reads—

Eggs not specially provided for in this section, five cents per dozen.

The importation consists of the whites and yolks of hen's eggs frozen in tin cans, hermetically sealed, each can containing a little more than 40 pounds.

The evidence shows this substance as to weight is composed of the whites and yolks of eggs in about the proportion of 60 to 40, which is the ratio as to weight that ordinarily exists between the whites and the yolks of hen's eggs.

After importation it comes into competition with hen's eggs in our markets.

The importer makes the following contentions:

1. That the merchandise is not dutiable under paragraph 256, as it is not the article therein provided for.

2. That the merchandise is free of duty under paragraph 560 of the act of 1909, which provides for free entry of "Eggs of birds \* \* \*."

3. That the merchandise is a manufactured article composed of two or more materials, the one of chief value being egg albumen and dutiable under paragraphs 481 and 257 of the same act, the material parts of which are as follows:

481. \* \* \* and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value. \* \* \*

257. Eggs, dried, fifteen cents per pound; eggs, yolk of, twenty-five per centum ad valorem; albumen, egg or blood, three cents per pound. \* \* \*

4. That the merchandise is properly dutiable under said paragraph 257 as egg albumen chief value.

With reference to his first contention, the appellant says, in substance, that paragraph 256 relates to eggs that are contained in the shell, and so susceptible of being counted; that this mixture of whites and yolks in a frozen condition is not susceptible of being counted as eggs by the dozen and therefore not included within the fair meaning of paragraph 256.

The record presents this question in manner following: In assessing the duty by the dozen, the collector estimated that 11 eggs would make a pound of the mixture. No evidence was taken by either party tending to show whether or not this estimate was correct.

The appellee contends that under such a state of facts the burden is upon the importer to establish by evidence the incorrectness of the action of the collector, and, having failed in that regard, that this court will presume the same to be correct.

We have already considered a similar question in the case of the Pantasote Company v. United States, decided October 18, 1910, and

adopted the principle for which the appellee contends, *supra*, p. 17. (T. D. 31008.)

It seems to be settled law, both upon reason and authority, that the judgment of the collector in classifying dutiable merchandise will be presumed to be correct until it is shown by proof to be erroneous. He is an officer selected by law to decide the questions of classification and empowered and required to pronounce judgment thereon. The proper conduct, management, and operation of the revenue system require that his decisions upon questions within his jurisdiction should carry with them the presumption of correctness.

The person who contends it to be erroneous is likened to a debtor claiming property seized by a sheriff upon execution to be exempt therefrom. Upon such person the burden is cast of making good his claim by proof. Argument, however logical, is not proof. *Arthur v. Unkart* (96 U. S., 118); *United States v. Schering* (123 Fed. Rep., 65).

It follows that this contention of the importer is not sustained.

In the same connection the importer contends that the collector at the port of New York differently classified similar merchandise so as to establish an official practice of assessment which should be of weight and control. Upon this question it appears from the evidence that during the years 1903 and 1904 infrequent shipments of whites and yolks of eggs not frozen but usually containing some preservative were assessed at the rate of 25 per cent ad valorem as similar to egg yolk; that during the year preceding the importation in question this practice had been followed and that the change in the assessment was made at the time of this importation by special instructions of the Treasury Department.

We do not think these facts change the situation.

The appellant's second contention that the eggs are free of duty under paragraph 560, as we view it, lacks merit.

The words "eggs of birds" as used in this paragraph manifestly do not relate to eggs of poultry which are brought here in direct competition with our own producers.

Schedule G of the tariff act of August 5, 1909, in which paragraph 256 is found, relates to agricultural products and provisions, and it is clear to us that this paragraph includes hen's eggs. To hold otherwise would practically nullify paragraph 256 as, if it be held that hen's eggs are embraced in paragraph 560, it is difficult to see why the eggs of all poultry would not be entitled to free entry. Under such a construction there would be few, if any, eggs of commercial importance coming within the meaning of the paragraph.

This question has already been passed upon by the courts in the case of *Sun Kwong On v. United States* (143 Fed. Rep., 115). There it was claimed that domesticated duck's eggs in the shell, packed in salt and mud, were entitled to free entry under paragraph 549 of the



tariff act of 1897. They were held to be dutiable under paragraph 244 of the same act. It will be observed that so far as applicable to the case now before us paragraphs 244 and 549 of the act of 1897 are reenacted in paragraphs 256 and 560 of the law of 1909. We have no question that the last-cited case correctly construes the paragraphs.

Relating to the appellant's third contention, that the merchandise is dutiable as an article manufactured of two or more materials, it seems to us that he misapprehends the force of the evidence. In effect, he claims that the eggs are by one operation broken and the whites and the yolks separated and placed in different containers, that afterwards they are reunited in such proportions as the trade requires, stirred, canned, and frozen solid, which manipulations produce, he says, a manufactured article consisting of two materials, viz, egg whites or egg albumen and egg yolks, and therefore dutiable as above suggested.

Passing the question of whether or not such operations would be a manufacture, we think the evidence fails to disclose that this importation was so produced.

The record discloses that the only witness who testified upon this subject was offered on behalf of the appellant. He testified, in substance, that merchandise similar to that in question was prepared as follows: The eggs are brought in from the country in bulk; girls are employed to break them, and at the time of breaking the whites and the yolks are either cast into one receptacle or are separated as may be desired. If the whites and the yolks are not separated at the time of breaking it is not afterwards attempted. For the process of breaking without separation these girls receive 5 cents per 1,000 eggs, which is increased 1 cent per 1,000 if the whites and yolks are separated. That the separation is made when the orders for the merchandise require.

The evidence does not disclose that this importation was produced by the mixing of whites and yolks that had already been separated. The fact that the proportion of whites and yolks it contains is the same as exists in the ordinary hen's eggs leads rather to the contrary conclusion. It would seem to be a useless operation to first separate and then reunite the whites and yolks of the same eggs, or of others in the same proportion that they are naturally found, and we can not find any evidence that it was so done in this case. On the contrary, we conclude that this importation consists of eggs which have been removed from the shell, canned, and frozen before importation, and it is not claimed such a substance is a manufactured article within the meaning of paragraph 481.

The foregoing conclusions render unnecessary any discussion of the appellant's fourth claim.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* HORRAX (No. 396).<sup>1</sup>

## TAPELIKE BELTING FOR CIGARETTE-MAKING MACHINES.

A tapelike article made of cotton or other vegetable fiber and used as a belt running over the wheels of a cigarette-making machine is not dutiable under paragraph 349, tariff act of 1909, but is dutiable under paragraph 330 of that act. *Morrison et al. v. United States*, 107 Fed. Rep., 113.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23751 (T. D. 30828).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

*Walden & Webster* for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

Appeal by the United States from a decision of the Board of General Appraisers, reversing the action of the collector at New York in assessing duty at the rate of 60 per cent ad valorem, under the provisions of paragraph 349 of the tariff act of 1909, on certain material sold by the importer to manufacturers of cigarettes and used by them as belting on cigarette-making machines. The provision in paragraph 349 of the act of 1909 is as follows:

\* \* \* tapes, \* \* \* composed wholly or in chief value of cotton, flax, or other vegetable fiber, \* \* \* not elsewhere specially provided for in this section. \* \* \*

The importer contends that the proper duty is 30 per cent ad valorem, under that part of paragraph 330 of the aforesaid act which provides:

\* \* \* belting for machinery made of cotton or other vegetable fiber and india rubber, or of which cotton or other vegetable fiber is the component material of chief value. \* \* \*

At the trial, which was had before the Board of General Appraisers, several witnesses gave their testimony. The evidence produced by the importer was substantially that the article, which is a strong, tape-like manufacture of an inch in width, is used for machine belts on cigarette machines. The material is cut into proper lengths, then sewed together to make a belt. The belt is run over the wheels of the machine, which are about 4 feet apart, very much as factory belting is ordinarily used where machinery is employed. The purpose of the belt is to convey the paper and tobacco to a tube where they are put together in the form of cigarettes.

The evidence of the Government's witnesses tends to show that the article was commercially known as tape, and, though wider, was quite

<sup>1</sup> Reported in T. D. 31187 (20 Treas. Dec., 32).

similar to tapes used for bindings, trimmings, and strings; that narrower tapes were sold to tailors; and that on one occasion such a special tape as is involved herein had been imported for and sold to a tobacco company which used it for "bunching cigars and putting in cigarette machines."

The case of the Government is weak upon the evidence. For instance, Mr. Cantrell, one of the witnesses, said that his firm had not had actual experience in the buying and selling of the particular material involved in this suit. But Adolph Keller, another witness for the Government, said that he had had experience with tapes very similar to the kind illustrated by the exhibit, and that upon one occasion he had imported tape identically the same for a tobacco company which used it for bunching cigars and putting in cigarette machines. Adolph Albert, a dealer in tapes, buckles, etc., also called by the Government, said that his house dealt in tapes of narrower widths, used for tailoring purposes and manufacturing; that they sold to jobbers who sold to tailors, but that they never sold a tape as wide as the exhibit.

Upon this evidence we must affirm the finding of the board in its deduction that the article is a belting for machinery made of cotton or other vegetable fiber. The belting may be called a tape in the sense that it is a narrow, flexible band of a strong fabric, rotating on machine wheels, and used to convey cigarette papers and tobacco, but it is specifically a tape actually imported to be used as belting for transmitting motion from one piece of machinery to another, and is sold to cigarette manufacturers and used by them for such purpose, and it would seem from the evidence is not sold for any other use.

This being so, the principle which must be applied is that inasmuch as the articles are principally and commonly used as belting for cigarette machinery, the use for belting must prevail, and determines the classification. *Magone v. Wiederer* (159 U. S., 555), *Meyer et al. v. Cadwalader* (89 Fed. Rep., 963). Again, if we assume that paragraph 349 pertains to a class of tapelike fabrics, such as we have before us, nevertheless we find that the word "tapes" in paragraph 349 is qualified by the words "not elsewhere specially provided for in this section," while the provision in paragraph 330 for "belting for machinery" is not so limited. The provision for belting for machinery must therefore control, under the rule that if an article is within the terms of a general designation, qualified by the phrase "not specially provided for," and there is a specific term not so qualified covering the article, the classification should be under the unqualified clause. *Morrison et al. v. United States* (107 Fed. Rep., 113).

As these views seem to us to be decisive of the case, the decision of the board is *affirmed*.

BOGLE *v.* UNITED STATES (No. 20).<sup>1</sup>

## MARMALADE AND JAMS.

Marmalade and berry jam are not jellies but sweetmeats, and were dutiable as such under paragraph 263, tariff act of 1897.

United States Court of Customs Appeals, January 5, 1911.

APPEAL from decision of the United States Circuit Court for the Southern District of New York (T. D. 30167; 175 Fed. Rep., 889; T. D. 28428).

[Affirmed.]

*B. A. Levett* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

Bogle & Scott and John Duncan's Sons, appellants, imported certain marmalade and berry jams into the United States at New York. The collector assessed duty at 1 cent per pound and 35 per cent ad valorem, under paragraph 263 of the tariff act of 1897.

Paragraph 263 is as follows:

Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum of alcohol and not specially provided for in this act, thirty-five per centum ad valorem and in addition two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum; jellies of all kinds, thirty-five per centum ad valorem; pineapples preserved in their own juice, twenty-five per centum ad valorem.

The importers were dissatisfied, and upon review by the Board of General Appraisers, and thereafter by the United States Circuit Court for the Southern District of New York, the action of the collector was sustained.

The contention of the importers is that the goods are dutiable under paragraph 263, as jellies, at 35 per cent ad valorem, or under paragraph 262, as edible fruits prepared in any manner, at 2 cents per pound, or under section 6, at 20 per cent ad valorem, as nonenumerated manufactured articles.

Paragraph 262 reads as follows:

Apples, peaches, quinces, cherries, plums, and pears, green or ripe, twenty-five cents per bushel; apples, peaches, pears, and other edible fruits, including berries, when dried, desiccated, evaporated or prepared in any manner, not specially provided for in this act, two cents per pound; berries, edible, in their natural condition, one cent per quart; cranberries, twenty-five per centum ad valorem.

The record shows that, after hearing a number of witnesses, the Board of Appraisers were of the opinion that jelly, as covered by paragraph 263, consists merely of the juice of the fruit mixed with

<sup>1</sup> Reported in T. D. 31188 (20 Treas. Dec., 34).

sugar, the same being cooked together to bring it to the right taste and consistency. Marmalade, in the opinion of the board, did not correspond to this description, but was rather a sweetmeat or fruit preserved in sugar. The board also held that the berry jams were properly assessed under the provision in paragraph 263 providing for sweetmeats and fruits preserved in sugar.

Murray's English dictionary defines marmalade as—

a preserve or confection made by boiling fruits (originally quinces, now usually Seville oranges) with sugar, so as to form a consistent mass.

The evidence shows that in the manufacture of marmalade the whole fruit is boiled excepting the seed or fiber pulp that is contained around the juices or cells; that is eliminated. The flavor of marmalade is described as bittersweet. Marmalade is not a jelly, for the reason that a jelly is a preparation of the juice of fruit, thickened into a soft, stiff, homogeneous consistence, and usually semitransparent. That is to say, the marked difference between marmalade and jelly is that the one is made with the fruit itself boiled, while the other is made from the juice of the fruit. Witnesses of long experience in the manufacture and sale of marmalades, jellies, and preserved fruits of all kinds recognize the distinction already pointed out, and say that marmalade is not bought and sold as a jelly; that it is known as having the pulp of the fruit in it, while jelly is the fruit juice strained to remove the fruit particles. Thus we have a case where the uniform and generally accepted meaning of words and well-understood trade meanings harmonize with substantial unity.

We need not dwell upon the argument of the appellants that marmalade is not properly a fruit preserved in sugar, as included in section 263 (*supra*), for it is so clearly a sweetmeat that we can well rest our decision upon a finding that it should be classified accordingly. The Century Dictionary defines a sweetmeat as "fruit preserved with sugar, either moist or dry; a conserve; a preserve; usually in the plural." The fact that there is a bittersweet taste to marmalade does not exclude it from the definition of a sweetmeat any more than would ginger boiled in sugar be excluded from within that term. And that ginger so treated is a sweetmeat has already been decided by this court in *R. M. Delapenha & Co. v. United States* (*supra*, p. 113, T. D. 31116.)

Much of what we have just said applies to the jams involved in the present case. They are not jellies, but are conserves of fruit prepared by boiling the fruits with sugar to a pulp. While we think jams might well be called fruits preserved in sugar (*Habicht v. United States*, *supra*, p. 10, T. D. 30772), or preserves, under the weight of the evidence they are so clearly sweetmeats, and therefore subject to the same rates of duty imposed upon fruits preserved in sugar, that it

becomes unimportant to analyze the testimony of one of the witnesses who attempted to make a distinction between fruits preserved and fruit preserve.

The decision of the Circuit Court, affirming the decision of the board, is *affirmed*.

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FOUGERA v. UNITED STATES (No. 134).<sup>1</sup>

1. PRESUMPTION AS TO COLLECTOR'S FINDING.

There is such a presumption in favor of a collector's finding as to the actual character of a commodity that this presumption is to be overcome only by a preponderance of proof that the article in question was something other than it was declared by the collector to be.

2. INTERNAL-REVENUE CIRCULAR.

A circular of the Commissioner of Internal Revenue fixing the taxable status of a commodity will not control in fixing the dutiable status of the same commodity on importation. Here, it would appear, the instructions of the commissioner tend to confirm rather than to negative the finding of the collector of customs.

3. FRENCH RECIPROCITY TREATY.

The article was not covered by the French reciprocity treaty.

4. DUCRO'S ALIMENTARY ELIXIR.

Ducro's Alimentary Elixir was dutiable under paragraph 67, tariff act 1897.

United States Court of Customs Appeals, January 7, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York  
(T. D. 29690).

[Affirmed.]

*Curie, Smith & Maxwell* (Thomas M. Lane, of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

A certain mixture or compound known as Ducro's Alimentary Elixir, imported at the port of New York, was assessed by the collector of customs as a medicinal preparation containing alcohol, at 55 cents per pound, under the provisions of paragraph 67 of the tariff act of July 24, 1897, which reads as follows:

67. Medicinal preparations containing alcohol, or in the preparation of which alcohol is used, not specially provided for in this Act, fifty-five cents per pound, but in no case shall the same pay less than twenty-five per centum ad valorem.

The importers protested that this elixir was a compound liquor dutiable at \$1.75 per gallon under paragraph 289 or paragraph 292, schedule H of said act, by virtue of the reciprocity treaty entered into between the United States and France on May 30, 1898, or under said paragraphs by similitude, or at 10 or 20 per cent ad valorem as an article not enumerated or provided for.

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<sup>1</sup> Reported in T. D. 31208 (20 Treas. Dec., 65).

The board overruled the protest and the importers appealed to the United States Circuit Court for the Southern District of New York, which appeal is now before this court by virtue of a transfer made in accordance with the tariff act of August 5, 1909.

The only question to be decided in this case is, Was the decision of the Board of General Appraisers affirming the collector's classification of the importation as a "medicinal preparation containing alcohol" warranted by the evidence? We think it was. The appraiser returned the merchandise as a "medicinal preparation containing 23 per cent alcohol, which is used medicinally as a tonic, an appetizer, and a reconstituent." The labels or the circulars accompanying the preparation announce that it is a remedy to be administered in cases of anæmia, chlorosis, phthisis, consumption, and other diseases. The collector found that the elixir was a medicinal preparation containing alcohol and assessed it for duty as such. On the hearing the importer introduced no evidence save and except a letter and circular issued by the Commissioner of Internal Revenue, directing that the special tax required of liquor dealers be collected from those making sales of certain enumerated "alcoholic medicinal preparations," among them Ducro's Alimentary Elixir. The pertinent and material parts of the letter and circular are as follows:

TREASURY DEPARTMENT,  
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,  
*Washington, January 11, 1908.*

GENTLEMEN: This office is in receipt of your inquiry of the 8th instant as to the form of liquor tax which must be paid by druggists and others who handle certain preparations held by this office to be insufficiently medicated to render them unsuitable for use as a beverage.

In reply, you are informed that the law requires the payment of a tax of \$25 by retail dealers in liquors and defines a retail dealer as "every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors \* \* \* in less quantities than five gallons at the same time." This provision of law is held to apply equally to saloon keepers and druggists who sell uncompound alcohol and spirits or the *class of preparations referred to above, held by this office to be properly classifiable as compound liquors*, and no distinction is made in the special-tax stamps evidencing the payment of tax either by saloon keepers or druggists.

Respectfully,  
E. FOUGERA & Co.,  
90 Beekman Street, New York, N. Y.

JOHN G. CAPERS, *Commissioner.*

TREASURY DEPARTMENT,  
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,  
*Washington, December 3, 1907.*

*To collectors of internal revenue and revenue agents:*

For your guidance is published the subjoined list of alcoholic medicinal preparations, which have been analyzed by this office and classed as compound liquors under the ruling in T. D. 1251 and for sales of which the special tax of liquor dealer is required.

*It must be clearly understood, however, that the list here given is not exclusive and does not purport to give names of all the preparations for the sale of which special tax is or*

may be required but embraces only those which have been analyzed by this office and held to be *insufficiently medicated* to render them unsuitable for use as a beverage. The names of a number of preparations which have been held in previous rulings and letters to be suitable for such use the manufacture of which has been discontinued or the formulas so modified as to change their classification are omitted.

For the sale subsequent to January 1, 1908, of any of the preparations here given or of any other preparations which do not come within the requirements of the law as to medication, as interpreted in *T. D. 1251*, special tax will be required, even though such sale is made in good faith for medicinal purposes.

The names of such additional preparations as are analyzed and classed with those here given will be published from time to time in Treasury Decisions, and whenever the number justifies, also as a circular.

The question of the proper classification of the various malt extracts now on the market is still under consideration, and the conclusion, when reached, will be announced in a later circular. Collectors are directed to place a copy of this circular in the hands of every druggist in their districts who has not already paid special tax as retail liquor dealer.

\*       \*       \*       \*       \*       \*

Ducro's Alimentary Elixir.

\*       \*       \*       \*       \*       \*

JOHN G. CAPERS, *Commissioner*.

From both letter and circular it is evident that the commissioner did no more than rule that certain preparations should be classified for *internal-revenue purposes* as compound liquors, not because they were not medicinal, but because their medication was not sufficient to render them unsuitable as beverages. Far from holding that the goods were not what they purported to be, he referred to them explicitly as "alcoholic medicinal preparations," and his classification of them as liquors can not by any fair interpretation of the language which he used be turned into a finding that they were unsuited for medicinal uses or that they were not "alcoholic medicinal preparations." Indeed, he expressly says that his ruling applies to such preparations, notwithstanding the fact that they may be sold "in good faith for medicinal purposes." But if the commissioner had not considered the elixir a medicinal preparation—even if his classification, made exclusively for internal-revenue purposes, could possibly raise a presumption that a similar classification should obtain for customs purposes—nothing more could follow than that the presumption arising from his ruling would balance the presumption necessarily attaching to a decision made by the collector of customs in the line of official duty, which condition of the proof would leave the importer just where he started—without a preponderance of evidence to sustain his protest. The decision of the collector carries with it the presumption of correctness, and the burden of overcoming that presumption by proper proof is on the importer. *Arthur v. Unkart* (96 U. S., 118, 122); *Erhardt v. Schroeder* (155 U. S., 124, 130); *Pickhardt v. United States* (67 Fed. Rep., 111, 113); *United States v. Rosenwald* (67 Fed. Rep., 323); *Thomson v. Maxwell* (23 Fed. Cas., 1100); *Vandiver v. United States* (156 Fed. Rep., 961).



There is no provision in the treaty with France which covers or refers to "medicinal preparations containing alcohol," and there is therefore nothing in that document which would entitle such preparations to admission at any less rate of duty than that specified in paragraph 67, above cited.

We hold to the view that the decision and finding of the collector was not overcome by evidence on the part of the importer, and therefore it is unnecessary to pass upon any of the other points discussed on the argument of the appeal or in the briefs of counsel.

The decision of the Board of General Appraisers is *affirmed*.

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MASSON v. UNITED STATES (No. 222).<sup>1</sup>

DATE OF INVOICE USED IN COMPUTING VALUES OF TWO DIFFERENT CURRENCIES.

Where merchandise was shipped on September 28, but was entered at the port of entry in the United States under an invoice dated and certified at the port of shipment October 1, the date of the invoice controls, and the proportion between the standard of values in the two countries as fixed by the United States Treasury Department for the quarter beginning October 1 governs in computing the actual money value of the imported goods.

United States Court of Customs Appeals, January 7, 1911.

TRANSFERRED from United States Circuit Court, District of Maryland (T. D. 29278).

[Affirmed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts of counsel) and *Gans & Haman* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Chas. E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

On September 28, 1907, 902 rolls of matting destined for the United States were shipped from Canton, China. The matting arrived at Baltimore and was entered for duty on December 3, 1907, under an invoice dated and certified by the consul general at Canton on October 1, 1907. In due course the merchandise was appraised and the actual market value and wholesale price thereof in the country from which it was imported was fixed at the invoice value of 20½ cents Hongkong currency per square yard. This valuation, when converted into United States money on the basis that \$0.538 United States currency equaled \$1 Hongkong currency, the rate proclaimed by the Secretary of the Treasury for the quarter which began October 1, 1907, brought the value of the matting to a fraction more than 10 cents a square yard, United States currency. The collector therefore assessed duty on the goods at 7 cents a square yard and 25 per

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<sup>1</sup> Reported in T. D. 31209 (20 Treas. Dec., 68).

cent ad valorem under the provisions of paragraph 333 of the act of July 24, 1897, which reads as follows:

333. Floor mattings, plain, fancy or figured, manufactured from straw, round or split, or other vegetable substances not otherwise provided for, including what are commonly known as Chinese, Japanese, and India straw mattings, valued at not exceeding ten cents per square yard, three cents per square yard; valued at exceeding ten cents per square yard, seven cents per square yard and twenty-five per centum ad valorem.

The importer protested that the appraisement of 20½ cents Hongkong currency per square yard should have been converted by the collector into United States money on the basis that \$0.522 United States currency equaled \$1 Hongkong currency, the official rate in force on September 28, 1907, the date of actual exportation. On the basis claimed by the importer the value of the matting would have been slightly less than 10 cents United States currency per square yard, and the goods would have been dutiable at 3 cents a square yard under the provisions of the paragraph already cited. The Board of General Appraisers sustained the collector, and the importer appealed to the United States Circuit Court for the District of Maryland, which appeal has been transferred to this court for determination in accordance with the provisions of the tariff act of August 5, 1909.

On the hearing before the Board of General Appraisers a letter, dated January 17, 1908, received by the collector of customs at Baltimore from the consul general at Canton was submitted by the appellant, from which it appears that an invoice for the shipment of matting dated September 28, 1907, and certified by the consul on that day, incorrectly stated the quantities shipped. The letter further discloses that on discovering the mistake the shippers, instead of requesting a "replace invoice," presented to the consul general an entirely new invoice accurately describing the consignment, which invoice was certified by that official on October 1, 1907, the day of its date and presentation.

There is but one point in this case, and that is whether the value of Hongkong currency proclaimed for the quarter beginning October 1, 1907, or that proclaimed for the quarter ending September 30, 1907, should be followed in estimating the value of the importation.

Under the terms of section 2 of the act of June 10, 1890, it is provided—

That all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importation shall be made.

Section 10 provides:

That it shall be the duty of the appraisers of the United States \* \* \* to ascertain, estimate, and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported.

Article 1246 of the Customs Regulations issued by the Treasury Department in 1899 makes it—

The duty of the appraiser or officer acting as such to make careful examination of any merchandise which the collector designates for that purpose and to appraise the actual market value or wholesale price thereof at the time of exportation in the principal markets *and in the currency of the country whence the same was imported.*

Section 13 of the act of June 10, 1890, requires that—

The appraiser \* \* \* shall report to the collector his decision as to the value of the merchandise appraised.

Section 25 of the act of August 27, 1894, provides that—

The values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury \* \* \* quarterly on the 1st day of January, April, July, and October in each year. *And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation.*

Under the Treasury Regulations it is made the duty of the *collector* to reduce the foreign currency of the appraisement to its equivalent in United States money.

Considering these provisions of law and the Treasury Regulations promulgated for carrying them out, it is very evident that the appraisement of the actual market value and wholesale price of merchandise *at the time of exportation to the United States*, which is required to be made in the currency of the country from which the merchandise is exported, is a distinct proceeding from the conversion by the collector of that valuation into United States money for the purposes of assessing duty.

In a word, it is the duty of the appraisers to value goods as of the time of actual exportation and in the currency of the country from which they are imported. The duty of the collector, on the other hand, is to convert that valuation into United States currency at the official rate in force for the quarter *of the actual date of the invoice* upon which the merchandise has been entered, which date, for the purposes of currency conversion, is made by statute the date of exportation. In this case the appraiser appraised the matting at 20½ cents, Hongkong currency, a square yard, the invoice value, and no claim has been or could be made that that was not the value of the merchandise at the time of exportation. The record shows that the collector converted the appraised value into United States currency at the rate fixed for the quarter beginning October 1, 1907, the date of the invoice upon which the entry of the goods was actually made. In so doing the collector complied with the mandate of the statute and therefore committed no error.

The letter addressed to the collector by the consul general at Canton was received subsequent to the conversion and after appeal to the Board of General Appraisers. But even if it had been received prior to liquidation of the entry the communication was entirely extra-official, and there is nothing in the statute which would permit the collector to accept it in lieu of a corrected or replace invoice, much less to substitute for the actual date of the invoice on which the goods were entered the date of an invoice which was not a part of the official record upon which he was required to act. Why Congress fixed the date of the invoice as the date of exportation for the purposes of currency conversion is not very clear. It is probable, however, that the fixing of a positive date for converting foreign-currency values was induced by a desire to give shippers and importers at the time of acquiring the goods definite and certain information as to the value thereof in United States currency, and consequently of the amount of duty which they would be required to pay. However, whatever was the motive of the legislature in that behalf, the provision that valuations in foreign currency shall be converted as of the date of the invoice is mandatory, and neither the collector nor the courts have any right to disregard it. *United States v. Lawrence* (137 Fed. Rep., 466).

What would be the effect of the presentation of a pro forma or corrected invoice it is unnecessary to decide. No such invoices were presented to the collector in this case.

The decision of the Board of General Appraisers is *affirmed*.

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#### UNITED STATES *v.* MARK (No. 256).<sup>1</sup>

IRON DRUMS—"TANKS OR VESSELS" CONTAINING GLYCERIN.

Reviewing in full the history of legislation affecting these containers, cylindrical iron drums used in commerce to convey glycerin are held dutiable under paragraph 151, tariff act of 1909.

United States Court of Customs Appeals, January 7, 1911.

APPEAL from a decision of the United States Board of General Appraisers, G. A. 7027 (T. D. 30644).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

*B. A. Levett* for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

Glycerin contained in iron drums was imported into the country at the port of New York. In addition to the duty which attached to the glycerin under paragraph 24 of the tariff act of August 5, 1909,

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<sup>1</sup> Reported in T. D. 31210 (20 Treas. Dec., 71).

the collector assessed a duty of 30 per cent ad valorem on the containers under paragraph 151 of the same act. The importer did not challenge the assessment upon the glycerin, but protested that the iron drums should be admitted free of duty as the usual containers of the merchandise imported.

The Board of General Appraisers sustained the protest and the Government appealed.

The subject matter of this controversy consists of large cylindrical iron vessels or drums fitted with a bung closed by a screw cap. Two half-round iron hoops placed at the ends and two near the middle of these receptacles make it possible to move them conveniently from one place to another.

It is undisputed that for a period of about 30 years immediately prior to the importation under consideration glycerin was transported to the United States uniformly in these cylindrical iron drums, and that during all that time they were admitted free of duty as the containers in which glycerin was usually imported. In re protest of Curtis, Davis & Co. (T. D. 23131); *United States v. Leggett* (66 Fed. Rep., 300). The Government claims, however, that the Sixty-first Congress, during its first session, changed the status of the drums and made them dutiable by the introduction of the following language into paragraph 151 of the tariff act recently adopted:

151. \* \* \* cylindrical or tubular tanks or vessels, for holding gas, liquids, or other material, whether full or empty, thirty per centum ad valorem. \* \* \*

This legislation originated in the House and seems to have been induced primarily by certain data submitted to the Committee on Ways and Means by a compilation known as Notes on Tariff Revision, which was prepared for the information of the committee and considered by it in making up the tariff bill which it ultimately reported. The Notes, among other things, called particular attention to the interpretation which had been given by the courts to paragraph 152 of the tariff act of 1897, and pointed out that in the cases of *Downing v. United States* (99 Fed. Rep., 423), *United States v. Liquid Carbonic Co.* (T. D. 28863), and *Knauth v. United States* (T. D. 29010) certain large cylindrical and bottle-shaped metal vessels, and metal tanks and reservoirs, some of them 35 feet long and 8 feet in diameter, closed at both ends and equipped with plugs, valves, and manholes, had been judicially classified as tubes within the meaning of that paragraph. After some comment on these decisions it was suggested in the Notes that vessels of the character mentioned should be provided for specifically in the paragraph covering articles of metal wholly or partly manufactured, or that they should either be included by name in the paragraph to which the courts had assigned them or excluded from it by appropriate language. The Committee on Ways and Means appears to have been impressed by the second

suggestion and inserted the following provision in paragraph 150 of the bill as it was originally reported to the House:

150. \* \* \* cylindrical or tubular tanks or vessels, for holding gas or liquids, thirty per centum ad valorem. \* \* \*

This clause passed the House and as a part of the House bill went to the Senate. In the Senate, however, the Committee on Finance saw fit to amend the House provision, and reported it back so as to read:

150. \* \* \* cylindrical or tubular tanks or vessels for holding gas, liquids, *or other material, whether full or empty*, thirty per centum ad valorem. \* \* \*

Thus reported it passed the Senate, went to conference, was agreed to by the House conferees, and finally became a part and portion of paragraph 151 of the tariff act approved August 5, 1909.

In brief, the House had before it for consideration certain large-sized, strongly built cylindrical or tubular metal tanks or vessels for holding gas and, possibly, liquid gases. It decided that such vessels should pay a duty of 30 per cent ad valorem. The Senate had before it the same class of vessels and in its wisdom it determined that such vessels, whether they contained gases or liquids *or other material and whether full or empty*, that is, whether they were acting as containers or not, should be dutiable at the same rate. The House concurred in this broader dispensation, and that which was originally the intent of the Senate finally became the intent of Congress.

From this history of the provision counsel for the importers argue that as legislative action was induced by the Notes on Tariff Revision, which dealt only with the metal vessels which had been the subject of discussion in the cases above mentioned, the operation of section 151 should be restricted to that class exclusively and should not be extended to glycerin drums the nondutiable status of which had not been questioned. In its last analysis this is a contention by the importers that the usual containers of glycerin were not in the legislative mind when this particular clause was under consideration and that therefore it could not have been the intention of Congress to alter a long-continued practice and make them dutiable.

Had the provision become law in the form in which it was first adopted by the House, and had the word "liquids" therein no broader comprehension than that of liquid carbonic gas or other liquid gases, there would be some show of force in the argument that such a provision should have no wider application than that suggested. Unfortunately, however, for the position of the importers, the House provision was not allowed to stand in the Senate, and the words "*or other material, whether full or empty*" were added to it by that body. Giving to these words their plain, obvious, and ordinary meaning it would appear that the Senate intended to go beyond the purpose originally contemplated by the House and to make dutiable at 30 per cent ad valorem not only cylindrical or tubular tanks or vessels for holding gas or liquids, but also *all* vessels of a

similar character for holding *any other material, and whether such vessels were full or empty*. Whether we shall give to the words of the provision their plain, obvious, and ordinary meaning—whether we must determine the intent of the lawmaker solely from the language which he used—whether we can make an exception which he did not make—is therefore the question to be decided.

The language of the provision as it passed the Senate and finally became law is not vague, dubious, uncertain, indefinite, or ambiguous. There is nothing in it which leads necessarily to injustice or oppression and nothing which conduces to an absurd result. It is in contravention of no fixed or general policy of the Government. So far as the containers of specific-duty goods are concerned it conflicts with no express law—no actual expression of the legislative will, and is at war in no particular with the letter, spirit, intention, or meaning of the tariff act of 1909 taken as a whole. Under such circumstances it would seem that there is no ground for a reasonable belief that the Congress did not intend just what it said—that there is no room for construction, and therefore no sound, valid, or lawful reason for determining the true meaning of the statute—that is to say, the real intention of the legislature, by any other method than that of the language in which the law is expressed. A doubt as to the wisdom of a statute, a mere surmise or conjecture as to the legislative intent, affords no justification for the conclusion by a court that the legislature had some other intention than that which it clearly, obviously, and plainly expressed in words. A conclusion so reached would be nothing less than judicial legislation and a usurpation of functions which properly and constitutionally belong exclusively to another department of the Government.

To get at the thought or meaning expressed in a statute, contract, or a constitution the first resort in all cases is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted. \* \* \* So, also, where a law is expressed in plain, unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. \* \* \* Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation. *Lake County v. Rollins* (130 U. S., 662, 670-671).

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. *United States v. Goldenberg* (168 U. S., 95, 102-103).

It has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. *Paulina v. United States*, Marshall, C. J. (7 Cranch, 52, 60).

Where the language of a statute is transparent and its meaning clear there is no room for the office of construction. There should be no construction where there is nothing to construe. *Lewis v. United States* (92 U. S., 618, 621).

Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction. *Thornley v. United States* (113 U. S., 310, 313).

The spirit of the act must be extracted from the words of the act and not from conjectures *aliunde*. *Gardner v. Collins* (2 Pet., 58, 92).

Where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so. *Maxwell v. Moore* (22 How., 185, 191).

This is not the first time that *usual* containers of merchandise have been made dutiable, and by language no clearer, no plainer, and no more obvious than that incorporated in the provision which is under discussion. In the case of *United States v. Ross* (91 Fed. Rep., 108), it was held that bottles, which were the usual containers of soda water, were dutiable under paragraph 88 of the tariff act of 1894, which was as follows:

88. Green and colored, molded, or pressed, and flint and lime glass bottles holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled, and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for in this act, three-fourths of one cent per pound; \* \* \* if holding less than one-fourth of a pint, forty cents per gross; all other plain green and colored, molded or pressed, and flint lime and glassware, forty per centum ad valorem.

The words of this paragraph—

\* \* \* bottles \* \* \* whether filled or unfilled, and whether their contents be dutiable or free \* \* \*

no more strongly indicate the legislative intention to make certain usual containers dutiable than does the language—

\* \* \* cylindrical \* \* \* vessels for holding gas, liquids, or other material, whether full or empty \* \* \*

We can not agree with the board that the words "whether their contents be dutiable or free" distinguishes the *Ross* case from the case under consideration. Undoubtedly that special language was inserted in paragraph 88 of the tariff act of 1894 to avoid any complication which might arise touching the status of bottles as containers of goods exempt from duty. Their omission from paragraph 151 of the tariff act of 1909, whatever might be its effect on the usual containers of *free entry* goods, can hardly be twisted into a purpose to exempt from duty cylindrical vessels containing *dutiable* merchandise.

In the case of *Schmidt v. Badger* (107 U. S., 85), a collector of customs imposed a separate duty of 30 per cent ad valorem on glass bottles containing beer and ale. At the time of the importation



schedule D of section 2504 of the Revised Statutes contained the following provision:

Ale, porter, and beer in bottles, thirty-five cents per gallon; otherwise than in bottles, twenty cents per gallon.

Schedule B of the same section, among other things, provided as follows:

Glass bottles or jars filled with articles not otherwise provided for, thirty per centum ad valorem.

From the fact that the legislature imposed 15 cents per gallon more duty on ale, porter, and beer in bottles than was imposed on the same beverages in other receptacles it was argued that there was no intention to impose on such bottles under schedule B a further duty of 30 per cent ad valorem, and the case of *Karthauss v. Frick* was cited in support of the contention. Certainly in such a case there was *some* reason to surmise or conjecture that the additional duty of 15 cents per gallon was intended as a duty on the bottles and that there was no purpose to subject them to the duty prescribed by schedule B. Nevertheless the Supreme Court held that the duty of 35 cents per gallon was a duty on the *contents* of the bottles only and that the bottles themselves were dutiable at 30 per cent ad valorem. More than that, it held that the language of schedule B, “\* \* \* bottles \* \* \* filled with articles,” was sufficient to deprive the bottles of the benefit of the principle laid down in *Karthauss v. Frick*. If the fact that beer in bottles paid an additional duty of 15 cents per gallon did not legitimately permit the deduction that they had already been subjected to a duty and so allow a disregard of the letter of the statute—if the language “Glass bottles \* \* \* filled with articles” was sufficient to remove the bottles from the category of nondutiable containers, it is difficult to understand upon what theory this court would be justified in restricting the broad but explicit terms of paragraph 151, or upon what defensible ground cylindrical vessels containing glycerin could be singled out and excluded from its operation. Once the lawmaking power has clearly expressed its intention, the motives which actuated it—the reasons which induced the legislation—are beside the question. But if it were proper to inquire into them in this case they might be found in the fact that the admission free of certain classes of containers had been a fruitful source of trouble, friction, and litigation, or in the fact that some of such containers, among them glycerin drums, as appears from the record, had been treated as merchandise by importers who sold them in the markets of the country and thus brought them into competition with similar articles of domestic manufacture.

In addition to the claim that the drums are free of duty as usual containers, the importers set out in their protest that they were free

listed under the provisions of paragraph 500. A reading of the paragraph clearly discloses that it exempts not drums to import glycerin, but "iron or steel drums used for the shipment of acids, of either domestic or foreign manufacture \* \* \* actually exported from the United States." While we are not prepared to say, all the circumstances considered, that this provision, standing by itself, would justify the application of the principle that an exception made by the statute itself excludes all other exceptions, we do think that its history tends to show that the broad language of paragraph 151 was not a mischance. It appears from the Tariff Hearings, 7343-7345, that complaints were made to Congress that *glycerin drums* admitted free of duty and subsequently used to export American acids were assessed for duty on their return. Following these complaints the provision of paragraph 500, above set out, was enacted. From this it may be fairly assumed that Congress could not have forgotten the practice of admitting glycerin drums free of duty and that their removal from the category of duty-free containers under the literal terms of the statute was not the result of a legislative lapse.

The drums involved in this appeal are cylindrical iron vessels designed to hold glycerin, a liquid, a material. They are therefore dutiable as assessed by the collector.

The decision of the Board of General Appraisers is *reversed*.

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UNITED STATES *v.* WELLS, FARGO & CO. (No. 29).<sup>1</sup>

1. "UNWROUGHT," MEANING OF.

Words and phrases in customs laws are employed in view of a lay understanding and are accordingly assumed to be used with their natural signification; so construed "unwrought" in the phrase "metals unwrought" can not be taken to mean the presence of specific attributes in the metal—of malleability in the metal, for example.

2. LEGISLATIVE INTERPRETATION.

The Congress by tariff act of 1909, having placed rhodium specifically on the free list, must be taken inferentially to have intended theretofore to declare rhodium a dutiable article.

3. RHODIUM.

Rhodium is a metal and unwrought and as such was dutiable under paragraph 183, tariff act, 1897.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 17223 (T. D. 28481).

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

*D. Macon Webster* for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This action concerns rhodium. The collector of customs at the port of New York, upon an advisory classification from the appraiser

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<sup>1</sup> Reported in T. D. 31211 (20 Treas. Dec., 77).

at that port, assessed it for duty as a "metallic mineral substance, crude," at 20 per cent ad valorem, under the provisions of paragraph 183 of the tariff act of 1897, which reads:

Metallic mineral substances in a crude state, and metals unwrought, not specially provided for in this act, twenty per centum ad valorem; monazite sand and thorite, six cents per pound.

The appraiser reported it as "metallic rhodium" and advised the classification above given, which was adopted by the collector.

The appellee, then protestant, made claim that rhodium is a platina metal and free of duty under the tariff act of 1897, either under the provisions of paragraph 642 of the free list, which reads:

Platinum, unmanufactured, and vases, retorts, and other apparatus, vessels, and parts thereof composed of platinum, for chemical uses.

Or under paragraph 631, which reads:

Palladium.

Or under paragraph 583, which reads:

Iridium.

Or under paragraph 614, as a "mineral ore," which reads:

Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act.

And further alleged that if assessed at all for duty it should be at the rate of 10 per cent under section 6 of that act as an unenumerated unmanufactured article.

On appeal to the Board of General Appraisers the protest was sustained and the decision of the collector reversed, the board basing its finding upon a previous decision of the board, and stated:

As we held in the previous decision of the board this rhodium is not a metallic mineral, *it is a pure metal*, and not a metal in combination, mechanical or otherwise, with a mineral substance. *It is not a metal unwrought* in view of the ruling in *United States v. Roessler & Hasslacher Chemical Co.* (137 Fed. Rep., 770). \* \* \*

At the hearing before the Board of General Appraisers testimony was adduced on behalf of both the importer and the Government. From the record and matters within judicial cognizance of the court it is established that rhodium is what is characterized as one of the platina group.

The platina or platinum group consists of six separate and distinct elementary metals, which are platinum, rhodium, iridium, osmium, selenium, and tellurium. They are all rare elements in nature. Manifestly they are found in combination, and each by suitable process, complicated, it is true, is segregable from the others. The last discovered of the group was rhodium.

Platinum is perhaps a more familiar term outside of the chemical or scientific circles, and platinum is chiefly used for electrical pur-

poses in the manufacture of platinum wire and to some extent in chemistry. Sulphuric-acid apparatus, for instance, is made of platinum. The entire group, it seems, has been used in a coarse compound, as platinum.

Rhodium, when separated from the group by appropriate process, is used chiefly for scientific purposes and is found in very minute quantities and is sometimes used as a compound with gold in the manufacture of liquid bright gold, constituting an infinitesimal part. The respective uses of the others of the platinum group are here immaterial.

That rhodium is a separate and distinct element is agreed by all the witnesses and is conclusively shown by its method of preparation. A succinct statement of this, without exploiting the unnecessary details of the metallurgical operations, is set forth in Watts's Dictionary of Chemistry, volume 4, article "Rhodium," as follows:

Rhodium is generally prepared by adding iron to the mother liquors from which platinum has been extracted \* \* \*, and then treating the solid so prepared. The processes for the treatment of this residue are many.

Its elimination and segregation concerns the residue after the platinum, which is a separate element, has been extracted. That it differs in material necessarily follows; otherwise this element would not be separable and distinguishable.

The melting point of the two properties is different. So that it may be properly said that it differs from platinum in material, quality, and use.

The relevant provisions of law of the act of 1897 touching this group of metals, as quoted above, witnesses that the metals of this group specifically provided for were platinum, palladium, and iridium. The fact that palladium and iridium, similarly associated in the platinum group, were specifically provided for in the free list by Congress bears ample proof of the view of that body in contemplation of them, and that Congress viewed them, in a dutiable sense, as separate and distinct metals. Further light is thrown upon this aspect of the case by the language of Congress in the tariff act of 1909. In the last act Congress has, in paragraph 595 of the free list, specifically named all of this group in this language:

Iridium, osmium, palladium, rhodium, and ruthenium and native combinations thereof with one another or with platinum.

Counsel for the Government contends, with much force, that this is a legislative interpretation of the intent of Congress in the act of 1897. We are rather constrained to the view that it is a legislative admission that the language of the act of 1897 was not sufficient to cover the omitted metals found in this group and not named in the statute, and for that reason the respective sections of the free list,

above quoted, pertinent to this subject, were not, and were not deemed by Congress, sufficiently broad to include the omitted elements; hence its extended scope in the act of 1909.

The Board of General Appraisers found the merchandise to be a "pure metal." This finding is amply supported and uncontradicted by all the evidence in the record.

The board, however, concluded that by reason of the principles laid down in *United States v. Roessler & Hasslacher Chemical Co.* (137 Fed. Rep., 770) the classification under paragraph 183 of the tariff act of 1897 was precluded. The principle announced in that decision seems to have controlled the conclusions of the board, pertinent to paragraph 183, to hold that no metal could be included within that paragraph which was not capable of being wrought. The language of the court in that particular is as follows:

The ordinary meaning of "wrought" is worked up, elaborated, worked into shape, labored, manufactured, not rough or crude. "Unwrought" imparts the reverse of these conditions. When one speaks of an unwrought material he means one which has not been worked into shape, one which is unlabored, unelaborated, rough and crude. But the word also implies a material which is capable of being transformed from its crude material to an improved condition, produced by the labor to which it may be subjected. To be more specific, "unwrought metal" implies a metal which is capable of being wrought and not a substance which is only fit to be thrown into the crucible to be melted up with other ingredients to produce an entirely different and distinct product.

We are unable to agree with the Circuit Court of Appeals for the Second District in this construction of the paragraph. It seems to us that every well-settled canon of customs interpretation militates against the construction given the word "unwrought" as adopted by that court. That construction rests upon an assumed import or implication rather than the common understanding of the word.

It is a rule of statutory interpretation, confined not alone to the customs laws, but running through the universal scope of law, the "words and phrases are assumed to be used in their natural signification" and shall be so construed, the sole exception in customs adjudication being that commercial designation shall obtain over the common and accepted understanding of words where such is duly proven. In other words, before the plain understanding of a term can be deviated from it must be shown by plenary proof to have a different import in trade and commerce. The rule is perhaps most concisely stated in *Sonn v. Magone* (159 U. S., 417), wherein the Supreme Court declares in these words:

In construing a tariff act, when it is claimed the commercial use of a word or phrase in it differs from the *ordinary signification* of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal.

See also *Maddock v. Magone* (152 U. S., 368); *United States v. Buffalo Natural Gas & Fuel Co.* (172 U. S., 339).

The legitimate corollary of this often-pronounced rule of interpretation is that no meaning shall be given a word or phrase used in customs laws other than its ordinary or accepted meaning except upon plenary proof that this extraordinary meaning is fully and completely understood and accepted throughout the United States by all of those dealing wholesale in that class of goods.

The rule is based upon the sound principle that customs laws are drawn in view of the lay understanding (first) of the trade subject thereto, and (secondly) for the information of merchants and dealers who are not lawyers, and perchance may not be skilled in the finesse of the English language and who, with a common lay understanding, will be completely informed by the plain words of the statute as drawn by Congress what duties are levied and what penalties they may expect for a violation of the law.

Taxes are never levied by implication, and we do not feel at liberty, except in accordance with higher authority, to ingraft upon a statute a meaning resting solely in implication, rather than in the natural import of the expressed words as commonly accepted and understood by layman and merchant.

The rule is perhaps more clearly and concisely stated by Mr. Justice Story in *Adams et al. v. Bancroft* (1 Fed. Cas., 84), wherein he uses the following language:

I may add in this connection, that laws imposing duties are never construed *beyond the natural import of the language*; and duties are never imposed upon citizens upon doubtful interpretations; for every duty imposes a burden on the public at large; and is construed strictly, and *must be made out in a clear and determinate manner from the language of the statute*.

This decision has been quoted with approval by the Supreme Court of the United States and other courts in numerous cases. See *Hartranft v. Weigmann* (121 U. S., 609), and cases cited therein. No more concise statement of the law can be had.

In view of a rule so often pronounced we can not assume that poverty of language in the vocabulary of the Congress which employed it as will levy taxes and visit penalties upon the citizen or rest the collection of the revenues of the Government by implication.

These expressions are particularly pertinent with reference to the implied meaning added to the word "unwrought" in the paragraph under consideration. The ordinary definition of that word as approved by lexicographers is:

Worcester's Dictionary:

*Unwrought*: Not wrought; not labored; not manufactured.

Century Dictionary:

*Unwrought*: Not labored; not manufactured; not worked up.

And so in Soule's Dictionary of English Synonyms. Synonymous with "unwrought" are given the following:

Unfashioned, unformed, rude, crude, rough.

The natural meaning of unwrought, as shown by these definitions and synonyms is plainly and unmistakably nothing more or less than an expression of an unmanufactured condition, or a condition not in anywise advanced in manufacture. In fact, in other paragraphs of the tariff act, notably 93 and 595 of the free list, the word is used in exact apposition to "advanced in manufacture" or "manufactured," which may be deemed a legislative expression of its intended scope.

The learned court for the second district manifestly had these definitions in mind when it stated the natural import of the word "unwrought" as "when one speaks of an unwrought material he means one which has not been worked into shape; one which is unlabored, unelaborated, rough, and crude."

Then the learned court proceeds to fasten upon the word an implication defined by the court in the following language:

To be more specific, "unwrought metal" implies a metal which is capable of being wrought and not a substance which is only fit to be thrown into the crucible  
\* \* \*

Waiving for the moment the natural significance of the term "unwrought," we hesitate to confine its necessary implication as confined by the court. The one implication allowed by the language of the court, as appears from the whole opinion, is a quality akin to malleability, or, rather, it assumes as necessary such a concrete form of metal as by hammering or by other process applied directly thereto will shape or advance it into some other article or condition. We do not believe that the necessary coincident condition to that of being "unlabored," "rough," or "crude," or "not worked up," the synonyms of "unwrought," is solely that the article be in such concrete form as by application of the hammer or other direct process will advance it into a different article or condition. We think that the article may be clearly unwrought without being malleable or in condition susceptible of advancement in manufacture as imported. It may be unwrought though the necessary added processes change its imported form or condition or its atomic construction and constitute, rather, a converted or new manufacture of the article; for example, by melting or dissolving in acids.

The mind can readily conceive of a pure metal which is not worked into shape, or which is rough, or which is crude, or which is unlabored, and which, at the same time, coincident with any one of these qualities, is not malleable, nor as yet of that concrete form which will permit of a changed condition by direct application of labor or

process. In fact, the latest lexicographic authority (Oxford Dictionary) plainly points out that while malleability, conductivity, and other qualities were formerly considered necessary elements of a metal, in the growth and development of commerce, manufacture, and invention, such have long ceased to be necessary. It states:

Any member of the class of substances represented by gold, silver, copper, iron, lead, and tin. Originally this class was regarded as including only these bodies together with certain alloys (as brass and bronze), and hence as definable by their common properties, viz, high specific gravity and density, fusibility, malleability, opacity, and a peculiar luster (known specifically as "metallic"). In process of time other substances were discovered to have most but not all of these properties; the class was thus gradually extended, the properties viewed as essential to its definition becoming fewer. From the point of view of modern chemistry the "metals" are a division (including by far the greater number) of the "elements" or simple substances. Among them are all the original (simple) "metals"; of the latter additions to the list some possess all the properties formerly viewed as characteristic of a metal, *while others possess hardly any of them*; the "metallic luster" is perhaps the most constant. By some chemists the radical ammonium ( $\text{NH}_4$ ) and derivatives thereof have been designated as "metals" on account of the analogy of their compounds with those of the metals potassium and sodium.

In popular language the term is not applied to a metallic element when in such a state of combination that its identity is disguised.

So that "unwrought" necessarily implies other conditions than capability of being wrought, many of which absolutely negative malleability or a capacity of being advanced from the per se condition. It is not for this court to attribute some and deny other of the attendant implications to a word as used in the statute.

Some light upon the intent of Congress and the sense in which the word was used in this paragraph may be shed by an examination of the same word in other paragraphs of the act.

For example, in paragraph 93 provision is made for "clays or earths unwrought or unmanufactured," and the same "wrought or manufactured," and in the same paragraph for fuller's earth "unwrought or unmanufactured," and the same material "wrought or manufactured." These clays or earths unwrought or unmanufactured, by a long line of decisions of customs officials, are the clays in their natural condition and not advanced by grinding or other process. In this condition clay or earth is quite similar to the original element rhodium, which seems to have been in the form resembling a black powder in this case.

There is nothing of malleability in the clay or earth, nor can it be labored into another form without the addition of other elements. Each process is a separation and rearrangement of its constituent atoms, rather than an advancement from its imported condition.

An equally familiar principle of interpretation which leads to the same conclusion in this case is that recently emphasized by the Supreme Court of the United States in the case of *United States v.*



Riggs (203 U. S., 137). In that case the Supreme Court adopted that construction of certain paragraphs which would affect the apparent intent of Congress, as the court said was expressed everywhere in the act, that the more valuable goods should bear the heavier duty.

Bearing in mind this principle, and examining in its light paragraph 183 under consideration, the intent of Congress in the use of the word "unwrought" becomes apparent. Two substances are provided for—"metallic mineral substances in a crude state" and "metals unwrought \* \* \* ." The same rate of duty is levied upon each—20 per cent ad valorem. Metallic mineral substances consist of a metal combined with some foreign or other substance. Metals unwrought consist of a pure metal, such as the Board of General Appraisers found this article.

In most cases, and clearly from the record in this case, a pure metal is in an advanced state or condition to that occupied by a metallic mineral substance in that it is separated from the substances which originally surrounded it. It may not be labored or in anywise advanced in condition, or wrought, if you please, but its segregation from the cradle of its creation and bringing to its imported condition no doubt has called for the expenditure of labor and the application of process. A metallic mineral substance may not have called for either, and is, therefore, more nearly in the mother condition. Metal unwrought, therefore, is usually in an advanced condition from a metallic mineral substance. If consistency is to be observed in the general scheme of Congress in levying duties, 20 per cent ad valorem, measured by the processes applied upon metals unwrought, will be a lower rate than the same rate upon metallic mineral substances. To reduce that rate, as claimed by the appellees, to 10 per cent ad valorem, would do violence to the intent of Congress as expressed in the language under consideration. Certainly such an interpretation should not be adopted in the presence of the rule stated when the sole reason that can be assigned for the same was founded upon implication from a term used and an assumption beyond its plain, ordinary meaning.

We think from its association in the paragraph Congress used the word in its ordinary acceptance and in contradistinction from metals manufactured or in anywise advanced in value, without any qualification by implication, the whole paragraph being devoted to crude raw metals, metallic mineral substances, and a class of sands exactly as the same term is used in paragraph 93 of the same act.

The return of the chemist at the port of New York and the testimony of the Government witnesses establish, without doubt, the fact that the merchandise was not in its crude state, but was a crude metal reduced from its crude state and separated from the accom-

panying substances surrounding it in that state by elaborate processes. It is not, therefore, a metallic mineral substance in a crude state within purview of paragraph 183. The Board of General Appraisers, however, found the importation to be a pure metal, and we think this finding incontrovertible. It follows that it is properly dutiable as such at the rate assessed by the collector, and accordingly the decision of the Board of General Appraisers is *reversed*.

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MAGNUS *v.* UNITED STATES (No. 33).<sup>1</sup>

ARTIFICIAL MUSK.

It not appearing from the evidence that the dominant characteristic of this commodity is derived from coal tar, it is not to be classed as coal tar; and tri-nitro-iso-butyl-xylol, or artificial musk, was dutiable under paragraph 3, tariff act of 1897.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29727).

[Affirmed.]

*John Giblon Duffy* and *Joseph G. Kammerlohr* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Artificial musk, constitutently known as tri-nitro-iso-butyl-xylol was imported by the appellants at the port of New York and assessed for dutiable purposes by the collector of customs at the rate of 25 per cent ad valorem under the pertinent provisions of paragraph 3 of the tariff act of 1897. That paragraph is as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

Claim by appellants, then protestants, was made that the merchandise was properly dutiable at the rate of 20 per cent ad valorem as a "coal-tar product or preparation," not a color or dye, and not medicinal, under the provisions of paragraph 15 of the same act, which reads:

15. Coal-tar dyes or colors, not specially provided for in this act, thirty per centum ad valorem; all other products or preparations of coal tar, not colors or dyes and not medicinal, not specially provided for in this act, twenty per centum ad valorem.

The sole issue in this case is whether or not tri-nitro-iso-butyl-xylol, or artificial musk, is a coal-tar product or preparation.

The history of the litigation affecting this case is as follows: Some years previously this issue was made before the Board of General

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<sup>1</sup> Reported in T. D. 31212 (20 Treas. Dec., 85).

Appraisers, and it was decided by them not to be a coal-tar product or preparation, but a chemical compound properly dutiable under paragraph 3 of the tariff act quoted.

Upon appeal to the United States Circuit Court for the Southern District of New York this decision was affirmed by consent.

The issue was again raised at the same port, and being duly noticed for trial before the Board of General Appraisers, the appellants here appeared and introduced one witness who testified in the case. The witness, while a graduate chemist, was an employee of the importing firm, and was not able to afford the board testimony as to any considerable experience upon his part as an analytical chemist or a chemist with any extended experience in the analysis of this article. It appears from the record that his knowledge was purely experimental. It was sought to establish by him, a single witness, that the trade generally knew and considered and dealt in the imported article as a coal-tar production. The board found against the importer in this case upon the ground that no satisfactory evidence had been introduced to cause the board to reverse its previous decision which had been affirmed by consent in the court on appeal.

Upon this record the court does not feel justified in reversing the decision of the board. It is by no means convincing of error. It would seem that in the presence of so many available witnesses upon this subject as are in the city of New York and the available process of the Board of General Appraisers to summon such witnesses, that if clear and satisfactory testimony existed it would be produced.

Moreover, accepting as conclusive all the testimony in the record as to the facts in the case, we are unable to discover any sound reason for reversing the decision of the board. What appears to us to be a clear and pertinent statement of the requirements of proof to bring this article within purview of paragraph 15 of the tariff act of 1897, as a coal-tar product or preparation, is announced in the case of *In re Roessler & Hasslacher Chemical Co.* (49 Fed. Rep., 272), and affirmed in the same case (56 Fed. Rep., 481). Judge Lacombe states:

Nor is it particularly material that other substances have been added, if the *determining characteristic of the product or preparation* is something which it has received from coal tar \* \* \*.

It seems to us that aside from any quantitative predominance in order to bring the article within purview of that statute it should be shown by the party holding the affirmative that coal tar was a dominating element to the extent that the efficiency, or at least the dominating characteristic, of the imported merchandise was derived from coal tar. In this case such proof is not made in the record.

*Affirmed.*

KRUSI v. UNITED STATES (No. 39).<sup>1</sup>

## 1. APPLIQUÉD COLLARETTES.

Whether collarettes designed to be sewn on women's dresses and intended for wear about the necks of women have been in fact appliquéd or not may be determined by actual inspection, and the court will take judicial notice of the facts in common knowledge and experience that show these articles to have been appliquéd.

## 2. HOW DUTIABLE.

Appliquéd collarettes, whether in chief value of silk or of cotton, were dutiable, silk collarettes at 60 per cent ad valorem under paragraph 390, tariff act of 1897, and cotton collarettes at the same rate under paragraph 339 of that act.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29482).

[Affirmed.]

*Brown & Gerry* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

Collarettes designed to be sewed to women's dresses and intended to be worn about the neck were assessed for duty by the collector of customs at the port of New York as silk wearing apparel at 60 per cent ad valorem under paragraph 390 of the tariff act of 1897. The importer protested that the merchandise was dutiable at 50 per cent ad valorem under paragraph 391 as manufactures of silk, or of which silk was the component material of chief value, or at the same rate under paragraph 314 as wearing apparel, neckwear, and so forth, of cotton, or at 45 per cent ad valorem, either as manufactures of cotton or of other vegetable fiber under paragraphs 322 and 347. The Board of General Appraisers overruled the protests, and the importers appealed to the United States Circuit Court for the Southern District of New York, from which court a transfer to this court has been duly perfected in accordance with the provisions of the tariff act of August 5, 1909.

The merchandise was returned by the appraiser as "completed collarettes composed of artificial silk, silk and cotton, silk chief value," subject to duty at 60 per cent ad valorem as silk wearing apparel.

The evidence of the importer is that some of the articles are made of silk and some of them of cotton, but that all of them are collarettes and intended for the same use, namely, to be sewed or pinned to women's dresses and worn about the neck. An inspection of the samples discloses that a piece of cloth cut to shape from a cotton fabric in one case and from a silk fabric in the other, with a small

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<sup>1</sup> Reported in T. D. 31213 (20 Treas. Dec., 87).

ornament in the center was sewed to the articles after the braids had been given the special form which makes them suitable to be worn about the neck. This addition forms a substantial, permanent part of the merchandise and serves the purpose of relieving what would otherwise be an unsightly space in the pendant portion of the collarettes. Any ornament laid out and applied to a surface in cloth, wood, or metal, is appliquéd within the ordinary meaning of the word. (Standard Dictionary.) From this it follows that whether the collarettes be made of silk or cotton, or both, with either as the component material of chief value, and whether they be silk or cotton wearing apparel, they are dutiable at 60 per cent ad valorem, the rate assessed, either under paragraph 390 or paragraph 339, the material portions of which are as follows:

390. \* \* \* Embroideries and articles embroidered by hand or machinery, or tamboured or appliqued, cloth ready made, and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all of the above-named articles made of silk, or of which silk is the component material of chief value, not specially provided for in this act, \* \* \* sixty per centum ad valorem.

339. \* \* \* Tamboured or appliqued articles, fabrics or wearing apparel; \* \* \* all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, \* \* \* sixty per centum ad valorem.

Touching the point made by counsel for the importer that there is no evidence in the record showing or tending to show that the goods are appliquéd, it is only necessary to say that admittedly fair samples of the goods were introduced in evidence and that from an inspection of them it was possible for the board, as it is possible for this court, to determine whether or not they are appliquéd. When facts which determine the classification of imported merchandise are ascertainable and ascertained from an inspection of the goods themselves by the Board of General Appraisers, availing itself of the common knowledge and experience of which judicial notice may be taken, it can not be said that there is no evidence to support a finding of such facts. It would seem, however, that when the facts upon which proper classification depend are patent to the eye of the expert only and the board has no record evidence before it as to the nature, kind, and character of the goods, it can not classify them solely on its own expert knowledge and experience, and a finding based exclusively on such expert knowledge and experience would be without evidence to support it. To hold otherwise would make the board the final judge in many cases of contested classification and would in effect deprive the importer of the right of appeal conceded by Congress. In this case an inspection of the goods, aided by nothing more than the facts of common knowledge and experience of which judicial notice may be taken, shows that they are appliquéd, and the finding of the board

to that effect was justified by the evidence which the goods themselves furnished.

The collector, the board, the court below, and this court are all equally entitled to avail themselves of such information as may be derived from an inspection of the articles in connection with the facts of common knowledge and experience, of which judicial notice may be taken. *United States v. Strauss* (136 Fed. Rep., 185).

The decision of the Board of General Appraisers is *affirmed*.

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GUTHMAN v. UNITED STATES (No. 41).<sup>1</sup>

"RATS"—HAIR ROLLS.

"Wearing apparel of every description" includes hair rolls or "rats" composed of cotton, wool, and metal, metal being the component material of *chief* value, and as such these were dutiable under paragraph 370, *tariff act* of 1897.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29629).

[Affirmed.]

*Comstock & Washburn* (George J. Puckhafer, of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Edwin R. Wakefield on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The question in this case is whether hair rolls, more commonly called "rats," composed of wool, metal, and cotton, metal being the component material of chief value, are to be classified as "wearing apparel of every description" under the provisions of paragraph 370 of the tariff act of 1897, or as "manufactures of wire or metal, or articles composed wholly or in part of metal" under paragraph 193 of that act.

No testimony was introduced in this case before the Board of General Appraisers other than a sample of the merchandise, which, being referred to the analyst in charge of the port of New York, was returned as "Mohair, 29.35 per cent; metal, 70.20 per cent; cotton, 0.45 per cent;" the proportions being in value.

Concededly the provision for wearing apparel of every description is more specific in terms than the expressions used by Congress in the other paragraphs, and if the merchandise comes within the description "wearing apparel of every description" it was properly classified by the collector, whose decision in the premises was affirmed by the Board of General Appraisers.

In some of the earlier decisions a disposition was manifested to confine the words "wearing apparel" to outer garments or clothing. In the later decisions, however, and we think it has been well settled for a long while, a broader scope has been assigned these words.

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<sup>1</sup> Reported in T. D. 31214 (20 Treas. Dec., 89).

In *Arnold v. United States* (147 U. S., 494), decided in 1893, the words "wearing apparel" were construed by that court. In the opinion it is stated as follows:

\* \* \* The term "wearing apparel" is not an uncommon one in statutes and is used in an inclusive sense as embracing all articles which are ordinarily worn—dress in general.

The court then proceeds to cite the use of these words in other statutes, such as making property exempt, the bankruptcy statutes, and other statutes, as follows:

\* \* \* No one would suppose that under such statutes a man's pantaloons and shoes were exempt while his drawers and socks were not. \* \* \* "Articles of wearing apparel of every description" was obviously meant to reach out and include everything that one wears.

As is well known, the use of this article is as a support by means of which the hair is arranged according to the prevailing mode of the coiffure. In this respect their use is not unlike that of corsets, which have long been held to be wearing apparel. As worn, neither are ornaments nor matters of personal adornment per se. They are plainly and clearly within the definitions laid down by the highest court as to what is included within "wearing apparel of every description."

*Affirmed.*

#### PIERCE v. UNITED STATES (No. 53).<sup>1</sup>

##### 1. PRACTICE IN CLASSIFICATIONS.

The rule that long-continued practice in customs cases should control in the classification of commodities is based on sound reason, but practice can not establish an arbitrary or wholly conclusive classification.

##### 2. CAPERS.

A review of tariff legislation from 1790 and of the pertinent decisions of courts fails to disclose any legislative purpose or uniform customs practice indicating an intent to classify capers as either pickles or as vegetables prepared or preserved; and capers being a condiment used to flavor vegetables and meats rather than an edible vegetable, they were not dutiable under paragraph 241, tariff act of 1897, but were dutiable as an unenumerated article in whole or in part manufactured, under the provisions of section 6 of that act.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court, District of Massachusetts, G. A. 6201 (T. D. 26849).

[Reversed.]

*Searle & Pillsbury* (*William E. Waterhouse* on the brief) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This importation was of capers. Dutiable classification was made by the collector at the port of Boston as a vegetable prepared or

<sup>1</sup> Reported in T. D. 31215 (20 Treas. Dec., 90).

preserved under paragraph 241 of the tariff act of 1897, which was in the following language:

241. \* \* \* all vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per centum ad valorem.

The provision is under schedule G, which provides for "agricultural products" and a specific subhead thereunder of "farm and field products."

The appellant maintains that the merchandise is properly free as drugs in a crude state under paragraph 548; or drugs advanced in value or condition under paragraph 20; or as a raw or unenumerated article not specially provided for under section 6; or as an article manufactured in whole or in part not specially provided for under the last cited section.

The Board of General Appraisers and the United States Circuit Court for the District of Massachusetts found and held against the appellant, and the case comes here by transfer from that circuit.

Capers consist of the well-known condiment used upon the table for the seasoning of meats and salads. They are the buds of the caper bush, which is a trailing vine grown in southern Europe and northern Africa. As imported they are put up in vinegar, largely in barrels and to some extent in bottles. The bottled importations are ready for use. The importations in barrels are packed in vinegar, it is alleged, for temporary preservation during shipment, and after arrival are washed so that all trace of the original vinegar is destroyed, and are then repacked in bottles with fresh vinegar for sale. They have a certain therapeutic value. The taste is an agreeable pungent one, and while long in use as a condiment and an ingredient of sauces the record discloses that if eaten in any considerable quantities they would be unhealthful, if not poisonous.

The article of merchandise has been the subject of tariff consideration from the earliest history of the Government. Incident to this fact, counsel for the Government, who maintains that the merchandise was properly assessed by the collector, asserts that the classification of the collector is supported by uninterrupted legislation and customs practice from 1790 to date, and, therefore, under the recent decision in the case of *Komada v. United States* (215 U. S., 392) should not be interrupted.

The principle of long-continued practice in customs cases as controlling the classification of merchandise has recently been extensively invoked. It, however, is not an arbitrary or conclusive rule, but can be invoked only in cases of doubtful meaning, as one of the aids in the ascertainment of legislative intent. It is based upon sound reason, first, because it represents the consensus of judgment of those experienced in the administration of the customs and familiar



with imported merchandise, and whose opinions, therefore, in the premises, are necessarily of great value. The fact, too, that official action is always supported by the presumption of correctness likewise adds respect to long-continued uniform practice exercised by numerous experienced officials. The rule, likewise, is undoubtedly supported by the salutary principle that where business has accommodated itself to certain effective official rulings, such should not be interrupted except in clear cases.

Where, however, the reason fails, the rule fails. In the case at bar certainly from 1790 to 1883 the reasons supporting this rule of interpretation did not exist. During all this period capers were not assessed as pickles. They were expressly provided for by Congress as capers *eo nomine*. There was no occasion for the exercise of any official judgment by way of classification. While they were associated in the paragraph with pickles there was no official determination that they were or were not pickles.

Less comfort is afforded the contention of the Government from the legislative construction sought. The precise contention of the Assistant Attorney General is as follows:

It thus appears that from 1790 to 1883, a period of 93 years, Congress expressly placed capers in the same dutiable class with pickles and taxed them at the same rate; and that, though capers have not been specially named in the law of 1883, the practice of classifying them as pickles has continued under that and the three following acts.

A reference to the precise provisions adopted by Congress may be profitable, as we regard the point made by the Government of legislative designation and long-continued practice the strongest urged.

The provision in the act of 1790 was as follows:

SECTION 1. \* \* \* all fruits and comfits, olives, capers, and pickles of every sort, \* \* \* ten per centum ad valorem. \* \* \*

In the tariff act of 1816:

Fifth. \* \* \* ; salad oil, pickles, capers, olives, mustard, \* \* \* thirty per centum ad valorem.

The only legislative interpretation that could be here invoked is that of *noscitur a sociis*, which obviously in these acts is without aid to the Government. The context of each paragraph shows such a variety of things specified that no uniform classification can be deducted. It can not be any more said that capers were pickles than that they were olives, or fruits, or salad oil, or mustard. The only legislative deduction possible from this collocation is that Congress was assembling several varieties of articles in one paragraph or sentence at one rate without regard to classification; and that Congress deemed "capers" as different from "pickles" as from olives, or fruits, or salad oil, or mustard.

In the tariff act of 1832 capers were made free of duty, but pickles were not, and therefore, so far as we are able to discover, capers were retained upon the dutiable list. Evidently by such legislation Congress indicated an intention to differentiate pickles from capers. This continued for 10 years, until by the act of 1842 the following provision was enacted:

SEC. 8, Par. 4. \* \* \* On pickles, capers, and sauces of all kinds, not otherwise enumerated, thirty per centum ad valorem.

And by the act of 1846, as follows:

Schedule C. \* \* \* Capers, pickles, and sauces of all kinds, not otherwise provided for, *thirty* per centum ad valorem.

And—

Schedule B. \* \* \* Prepared vegetables, \* \* \* *forty* per centum ad valorem.

This is the first appearance in the tariff acts of the term “prepared vegetables,” so far as we are able to discover.

By the tariff act of 1862, section 13, an additional 5 per cent was levied.

SEC. 13. \* \* \* Capers, pickles, and sauces of all kinds. \* \* \*

There seems to have been no further legislation specifically naming these articles until the tariff act of 1883. In the act of 1883 it was provided by separate paragraphs, as follows:

Schedule G, Par. 284. Pickles and sauces of all kinds, \* \* \* *thirty-five* per centum ad valorem.

Schedule G, Par. 287. Vegetables, prepared or preserved, of all kinds, \* \* \* *thirty* per centum ad valorem.

Schedule G, Par. 286. Vegetables, in their natural state, or in salt or brine, \* \* \* *ten* per centum ad valorem.

Capers, by specific designation, were dropped from the tariff act of 1883. It will be noted in passing that a different rate of duty was levied upon “vegetables in their natural state,” 10 per cent, and upon “vegetables, prepared or preserved,” 30 per cent, and “pickles and sauces of all kinds,” 35 per cent, indicating beyond controversy that Congress regarded them for dutiable purposes as separate and distinct classes of merchandise. Precisely the same distinction was drawn between capers and pickles as against prepared vegetables in the act of 1846. So that Congress, down to and including the act of 1883, not only separately specified capers and pickles and vegetables, prepared and preserved, but at times levied different rates of duty upon them.

The highest authority of contemporary construction of paragraph 284 of the act of 1883 was as rendered in *Bogle v. Magone* (40 Fed. Rep., 226), wherein Lacombe, judge in the circuit court for the southern district of New York, held that there was nothing about the language employed by Congress which indicated that the words

were used in a commercial sense, and that the popular sense of the words was plain and unequivocal, and for that reason he excluded testimony offered to prove the commercial usage of the words of the statute.

On appeal to the Supreme Court of the United States in *Bogle v. Magone* (152 U. S., 623) that court reversed the decision of the lower court, directing a new trial and stating that the court was of the opinion that the evidence of the nature and the use of the articles and their commercial designation would have warranted a jury in finding that they were not within the provisions of paragraph 214, and expressed the opinion of the Supreme Court that the merchandise in question was subject to duty under another and more specific clause of the tariff act. While the court did not expressly declare whether or not, in its opinion, paragraph 214 was used in a limited commercial sense or in its broader scope of ordinary language, it expressly refused to exclude evidence going to show that the terms therein employed were terms of commercial and limited usage. No further record is had of the case.

In *Nix v. Hedden* (149 U. S., 304) the Supreme Court had under consideration and construed paragraph 286 of the act of 1883, and in so doing laid down a broad and general definition of the word "vegetables" as used in that act. It held that vegetables were such things as were grown in the kitchen garden, and which are eaten cooked or raw, like potatoes, carrots, parsnips, turnips, etc., usually served at dinner with or after the soup, fish, or meats, which constitute the principal part of the repast. This definition by the court of last resort limits the scope of the words used in the tariff act of 1883 to such vegetables as are ordinarily grown in the garden and used upon the table for food purposes.

During the life of the tariff act of 1883 capers were probably classed as "pickles or sauces of all kinds," as appears from the record. It does not appear, however, that the question of their classification was ever contested under that act.

In the state of this judicial interpretation the tariff act of 1890 was enacted, which repealed the act of 1883.

The cognate provision of the tariff act of 1890 was as follows:

287. Vegetables of all kinds, prepared or preserved, *including* pickles and sauces of all kinds, not specially provided for in this act. \* \* \*

This was the consolidation of the two paragraphs of the act of 1883 with the conjunction "*including*." It is particularly pertinent, in view of the claims of respective counsel, to note the contemporaneous construction placed upon this provision by customs officials, for the reason that these provisions of the act of 1890, being modified by the act of 1894, were practically reenacted by the act of 1897, here under consideration.

The highest authoritative adjudication under that act was the construction placed thereon by Lacombe, circuit judge for the southern district of New York, in the case *In re Johnson* (56 Fed. Rep., 822), wherein the court said if Congress intended by the use of the phrase that the term "vegetables of all kinds prepared or preserved, *including* pickles and sauces of all kinds," to cover this particular article, bloater paste, they have conspicuously failed to manifest their intention in the language they have used.

The use of the word "including," and the placing of the clause in the paragraph referring to vegetables of all kinds, coupled with the circumstances that it is grouped with other provisions under the subhead of "farm and field products," would make it impossible for this court to hold that it included a fish sauce, without legislating on the subject, which this court does not sit here to do.

The act of 1894, paragraph 198, changed the phraseology of the act of 1890 by substituting the word "and" for the word "including" in the act of 1890, so that the provision read:

198. \* \* \* Vegetables, prepared or preserved, \* \* \* *and* pickles or sauces of all kinds, \* \* \*

The interpretation of this by customs officials and tribunals was that it enlarged the scope of the act of 1890. See *In re Park & Tilford*, G. A. 3671 (T. D. 17623), and *In re McDowell*, G. A. 4703 (T. D. 22176).

In the kindred provision of the act of 1897, paragraph 241, quoted *supra*, returned to the more restricted phraseology of paragraph 287 of the act of 1890, and practically repeated that paragraph.

All of the previous acts, and the construction placed upon them by customs officials and courts deciding customs issues being before the Congress in 1897, and the Congress having expressly chosen therefrom the restricted language of paragraph 287 of the act of 1890, and being advised of the more narrow construction placed thereon by the courts and customs officials, leaves no escape from the proposition that Congress intended the use of this paragraph in the act of 1897 in the restricted sense in which it was used in the act of 1890 as construed by the proper officers and tribunals. Having before us, therefore, for construction the precise language of that act, repeated in the act of 1897, under the well-settled rules of statutory interpretation, it is deemed that Congress adopted the construction placed upon the act of 1890. This construction was to the effect that the word "vegetables" as used therein and "pickles" were restricted to those familiarly known as such, those grown in the garden and field, and those commonly used upon the table as such, and did not include condiments such as are used solely for giving zest to foods.

As was clearly pointed out by the Board of General Appraisers, Howell, G. A., the fact that Congress has specifically included fish

paste and sauce in the act of 1897 rather emphasizes the exclusion of all other sauces than those made from vegetables and fish, and the fact that Congress intended the use of the words "vegetables" and "pickles" in their limited sense the word "*including*," therefore, as used in this paragraph of the act of 1897, was used by way of specification and not by way of addition of species to the previous genus, and both the words "vegetables" and "pickles" as used in this paragraph are entitled to be and were used in the restricted sense above stated.

This view concisely concurs with that view reached by the Circuit Court of Appeals for the Second Circuit, *Von Bremen v. United States* (168 Fed. Rep., 889), wherein it was held that truffles were not vegetables within purview of paragraph 241 of the tariff act of 1897. The court in that case expressly announces that it follows the higher authority in *Nix v. Hedden* (149 U. S., 304), and particularly criticizes and overrules the case of *Park v. United States* (61 Fed. Rep., 398), wherein truffles were held to be vegetables under the act of 1890.

So far as the record shows, with one exception, the practice has been, during the 12 years prior to this issue being made, to assess capers as "prepared or preserved vegetables."

Inasmuch as capers and pickles were from 1790 to 1883 specifically named by Congress, thereby, under the rule disavowing surplusage, being differentiated, and capers were under the act of 1883 classed as "pickles," while under the act of 1897 they were classed as "vegetables prepared or preserved," two subjects in various acts of Congress differentiated and given different rates of duty (1846 and 1883), we are unable to discover any legislative purpose or uniform customs practice indicating an intent to classify capers as either pickles or as vegetables prepared or preserved.

The court is of the opinion that the views expressed in the *Von Bremen* case, *supra*, are more persuasive; that the pickles, sauces, and vegetables provided for in paragraph 241 are confined to the garden and table varieties of edibles of those classes in which capers are not included, but are condiments used only for seasoning purposes.

This court, therefore, is of the opinion that capers, being a condiment used to flavor vegetables and meats rather than to be eaten as a vegetable, is not included within the provisions of paragraph 241 of the tariff act of 1897. It is not a vegetable, nor is it a vegetable pickle in the sense those words are used in the tariff act. Its particular classification will, therefore, be determined from its condition as imported. It seems agreed on the record that capers are imported in barrels chiefly, in which they are put up in vinegar for purpose of preservation. Let it be admitted for the purpose of argument that this preservation is a temporary one. They are cleansed upon arrival

and put in bottles with new vinegar for complete preservation and use. Whether the article is unmanufactured, or in whole or in part manufactured, is then to be determined from that condition. Evidently and indisputably the temporary preservation in transit by vinegar must be sufficiently effective to preserve them for a time at least. The change of this vinegar and the addition of other vinegar is but a continuation of the processes of manufacture or preservation already undertaken. We can not see how it can be said that the completion of a process already undertaken is not the completion of a partly accomplished process, and the result pickled capers. In accordance with all the lexicographic definitions they are, in fact, pickles, although they are excluded from those pickles provided for in paragraph 241 by the character of the pickles therein provided for. Accordingly this court is of the opinion that the merchandise is an article wholly or in part manufactured, and dutiable, as claimed by the appellant, as an unenumerated article in whole or in part manufactured, under the provisions of section 6 of the tariff act of 1897.

The imported article is material for, rather than, a sauce, and therefore similitude does not apply.

*Reversed.*

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KNAUTH v. UNITED STATES (No. 116).<sup>1</sup>

1. SAMPLES.

The official sample of the goods made the subject of controversy being selected by a customs officer charged with the duty of making a selection it will be presumed the sample so chosen is fairly representative of the merchandise.

2. JACQUARD FIGURED GOODS.

The sample exhibited showed the merchandise to have been Jacquard figured goods, in the piece, made of silk and cotton, silk being the component of chief value, two colors in the filling and the fabric dyed in the yarn; it was dutiable under paragraph 391, tariff act of 1897.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21021 (T. D. 29690).

[Reversed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*John A. Kemp* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

In this case certain goods imported by the appellants were returned by the customs appraiser at New York as woven fabrics in the piece, composed of silk and cotton, *piece dyed*, and weighing between 1½ and 8 ounces per square yard, silk being the component material of chief

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<sup>1</sup> Reported in T. D. 31216 (20 Treas. Dec., 97).

value and constituting over 45 per cent of the weight. As fabrics of the class reported are made dutiable at \$3 per pound under paragraph 387 of the tariff act of 1897, the collector assessed the goods so returned at that rate. The importers protested against the decision of the collector, and among other reasons for their objection thereto set up the claim that the merchandise was dutiable under paragraph 391 of said act, which fixes a duty of 50 per cent ad valorem on—

\* \* \* all Jacquard figured goods in the piece, made on looms, of which silk is the component material of chief value, dyed in the yarn, and containing two or more colors in the filling \* \* \*.

The Board of General Appraisers sustained the collector, and from its decision an appeal was taken to the United States Circuit Court for the Southern District of New York, which appeal, in accordance with the provisions of the tariff act of August 5, 1909, has been certified to this court for determination.

On the hearing before the board it was not disputed that the goods were Jacquard figured goods in the piece; that they were made of silk and cotton; that they were woven on Jacquard looms; and that silk was the component material of chief value. This left the number of the colors in the filling and the question of whether the fabric was dyed in the piece or dyed in the yarn as the only subjects of controversy between the importers and the Government.

The official sample of the goods is a silk fabric, the main body of which is dead white, relieved by small hexagonal figures outlined in glossy white thread and by white satiny stripes running with the warp. Crossing the width of the goods from selvage to selvage is a red stripe made of red cotton threads, which are the filling threads of that portion of the fabric covered by the stripe. So far as the *sample itself* is concerned, there can be no question but what there are two colors in the "filling." The report of the appraiser declared that the fabric was *piece dyed*, but contained no statement as to the number of colors in the filling. The Government contended, first, that the red stripe of the sample was found only at the end of the piece, that it was not repeated at intervals throughout the fabric, and that therefore the merchandise did not meet the requirement of two colors in the filling; second, that the special report of the appraiser to the effect that the goods were *piece dyed* was uncontradicted, and that therefore the goods must be held to be dyed in the piece and not in the yarn.

The Government attempted to show by two customs examiners that the red stripe appeared only at the end of the goods and was not repeated in the fabric, but failed, as one of the witnesses had no remembrance whatever of the goods and the other had seen nothing more than the sample. Counsel for the importers argued, first, that

as the official sample contained a red stripe woven from selvage to selvage, and therefore had two colors in the filling, it must be assumed that that condition was characteristic of the fabric; second, that the appraiser's special report stating that the goods were dyed in the piece was contradicted by the official sample, which showed conclusively that the fabric was dyed in the yarn and could not possibly have been dyed in the piece. The board held that the sample was too small to enable it to determine whether the red stripe repeated itself in the rest of the piece, and that as the burden was on the importers to show that the report of the appraiser was incorrect, it must find that the goods did not contain two colors in the filling, and that the fabric was dyed in the piece and not in the yarn. We can not sustain the findings of the board.

The report of the appraiser did not state that the red stripe was found only at the end of the piece or that it did not repeat itself. Neither did it make any mention whatever as to the number of colors in the filling. In fact, the examiner who furnished the appraiser with the data for his report had nothing before him except the sample, and with that under his eyes and with no information as to the rest of the piece he could not very well have informed his superiors that the stripe did not repeat itself or that there were not two colors in the filling. The appraiser was bound by the regulations to describe the merchandise in such terms as would enable the collector to properly classify it, and it was his especial duty not to omit from his report any factor which might justify the classification of the goods at a higher rather than a lower rate. If, therefore, any presumption attaches to the silence of the report as to the red stripe and the number of colors in the filling, it must be the presumption that the appraiser believed the red stripe to be characteristic of the goods and that he was not justified in reporting that the weft of the fabric was a monotint. Moreover, the official sample was taken by customs officers charged with the duty of properly selecting samples *fairly representative* of the merchandise, and it must be presumed that they met their obligation in that behalf and that the sample taken by them fairly represents the goods of which it once formed an integral part.

As there are two colors in the filling of the sample, it follows, in the absence of evidence to the contrary, that it must be assumed that that condition was characteristic and fairly representative of the rest of the goods. Counsel for the appellant claims that, independent of its location and of whether or not it repeated itself, the red stripe, being a part of the filling, met the statutory requirement of two colors in the filling. We do not go that far. A single stripe of a different color from the body of the fabric placed at the end of the warp and crossing the fabric from selvage to selvage would hardly



bring the merchandise within the color requirements of paragraph 391. The colors in the filling contemplated by the statute must be something more than mere incidental, immaterial parts of the completed article. Such colors must be permanent, substantial, characteristic features of the merchandise and designed to continue among its substantial, characteristic features when thrown into consumption and used by the consumer.

The report of the appraiser was some evidence that the goods were *piece dyed*. That evidence, however, is rebuttable—evidence, in other words, which may be combated and overcome by other competent evidence. In our opinion, it was completely rebutted in this case by the official sample, which was not only presumptively but affirmatively shown to be a true sample and to correctly represent the goods from which it was taken. An inspection of the sample shows beyond discussion that the color effects were not and could not have been produced after weaving, but were in the yarn before it was woven into the fabric. That condition existing in the sample, it must be presumed to have been characteristic of the rest of the goods, for the reasons already stated.

The decision of the Board of General Appraisers is *reversed*.

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WOLFF v. UNITED STATES (No. 175).<sup>1</sup>

1. FINAL APPRAISEMENT.

The customs laws contemplate finality at some point in all appraisement proceedings and finality is by law attached on appeal to an appraisement by the Board of General Appraisers, when the appeal comes to the board from a finding of a general appraiser, and a decision of that board on the actual market value of the merchandise in question is conclusive against all parties interested therein.

2. MATTING REAPPRAISED.

And, without inquiring into the objections urged against the reappraisement of matting by a local appraiser as erroneous, or as unsupported by the evidence, or as founded on irrelevant considerations, the Board of General Appraisers on appeal having found that appraisal correct, this finding can not be disturbed.

United States Court of Customs Appeals, January 11, 1911.

TRANSFERRED from United States Circuit Court. Eastern District of Louisiana, G. A. 6888 (T. D. 29628).

[Affirmed.]

*Brooks & Brooks* (*Frederick W. Brooks* of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

On April 18, 1907, 1,000 rolls of fancy, superfine, 116 warp Chinese matting, measuring some 40,000 square yards, was exported from

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<sup>1</sup> Reported in T. D. 31217 (20 Treas. Dec., 100).

China to the United States and arrived in New Orleans in June, 1907. The goods were valued in the consular invoice at 20 cents Hongkong currency per square yard, less nondutiable charges and the usual discount of 2 per cent. The local appraiser at New Orleans advanced the value to 23 cents per square yard, in the same currency, less discount and nondutiable charges.

It appears from the evidence in the case that the local appraiser was induced to make this advance by reason of the fact that a board of three general appraisers, acting as a board of reappraisement, had previously appraised at 23 cents other importations of the same class of merchandise. Upon notice by the importers of dissatisfaction with the advance made by the local appraiser, the importation went to reappraisement before a general appraiser, who, taking into account the testimony which induced Board No. 3 to recede from its valuation of 23 cents to that of 20½ cents per square yard on similar merchandise, felt compelled not to go below the lesser rate, and reappraised the importation at that figure as the proper value of the matting. The importers being still dissatisfied, this reappraisement was in due course submitted to three general appraisers and by them affirmed, sitting as a board of reappraisement. The appraisement and reappraisement proceedings ultimately resulted, therefore, in fixing the valuation of the matting at 20½ cents Hongkong currency per square yard, which, when reduced to our own money at the official rate for the quarter in which the merchandise was exported, brought its value, after deducting discount and nondutiable charges, to a fraction more than 10 cents per square yard United States currency. The collector of customs accordingly assessed the goods for duty at 7 cents per square yard and 25 per cent ad valorem, under the provisions of paragraph 333 of the tariff act of 1897, which reads as follows:

Floor mattings, plain, fancy, or figured, manufactured from straw, round or split, or other vegetable substances not otherwise provided for, including what are commonly known as Chinese, Japanese, and India straw mattings, valued at not exceeding ten cents per square yard, three cents per square yard; valued at exceeding ten cents per square yard, seven cents per square yard and twenty-five per centum ad valorem.

The importer protested that the entered value of the matting was the actual market value thereof, as defined by section 19 of the act of June 10, 1890; that duty had been assessed on a valuation in excess of said market value; that the proofs submitted to the appraiser, general appraiser, and the board of three general appraisers did not warrant the value found in either of the three appraisements; that in all of the appraisements before mentioned the appraisers proceeded on a wrong principle, contrary to law, and transcended the powers conferred on them by statute. The Board of General Ap-

praisers, sitting as a classification board, overruled the protest, and the importers, having applied for a rehearing, which was denied, perfected an appeal to the United States Circuit Court for the Eastern District of Louisiana, from which court a transfer of the case was made to this court, in accordance with the provisions of the tariff act of August 5, 1909.

Section 10 of the act of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," provides:

That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, \* \* \* by all reasonable means in his or their power to ascertain, estimate, and appraise \* \* \* the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported.

Section 13 of the act requires the appraiser to report to the collector his decision as to the value of the merchandise appraised, and makes his decision final against the importer unless the latter gives due notice of dissatisfaction therewith, in which event it is provided that the matter shall be submitted to a general appraiser, whose finding becomes conclusive unless an appeal is properly taken to a board of three general appraisers, the decision of which is declared to be "final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

This legislation had for its object the prompt collection of the Government revenues and was dictated by the consequent necessity for a speedy and *final* settlement of the all-important questions of actual market value and wholesale price of imported goods at the time of exportation. By it Congress confided to certain officers and a special tribunal exclusive jurisdiction of the subject matter of valuation and clearly manifested its intention that the basis upon which *ad valorem* duties are assessed and collected should not be submitted to the long, tedious, and necessarily complicated processes of judicial determination. When, therefore, those officers and that tribunal charged by the law with the special duty of appraising imported merchandise have acted within the powers conferred by statute, the exercise of their discretion on the subject matter of their jurisdiction, and the justice, correctness, and validity of their appraisal should not and can not, in the absence of fraud, be subjected to review by the courts.

It is a general principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter. \* \* \* The interposition of the courts, in the appraisalment of importations, would involve the collection of the revenue in inextricable confusion and embarrassment. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article

has been withdrawn from control of the Government, and when the knowledge of the transaction had faded from the memories of its officers. *Bartlett v. Kane* (16 How., 263, 272).

When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provisions for appeal have been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction. \* \* \* After Congress has declared that the appraisement of the customs officers should be final for the purpose of levying duties, the right of the importer to take the verdict of a jury upon the correctness of the appraisement should be declared in clear and explicit terms. So far from this being the case, we do not find that Congress has given the right at all. If, in every suit brought to recover duties paid under protest, the jury were allowed to review the appraisement made by the customs officers, the result would be great uncertainty and inequality in the collection of duties on imports. It is quite possible that no two juries would agree upon the value of different invoices of the same goods. The legislation of Congress, to which we have referred, was designed, as it appears to us, to exclude any such method of ascertaining the dutiable value of goods. \* \* \* We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by statute. *Hilton v. Merritt* (110 U. S., 97, 104, 106).

The Government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues. One of those conditions is, and always has been, that the determination of appraisers as to the dutiable value of goods shall be conclusive and not reexaminable in a suit at law, provided the appraisers are selected in conformity with the statute, and, in appraising, act within the scope of the powers conferred upon them. \* \* \* The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector. *Auffmordt v. Hedden* (137 U. S., 310, 324, 329).

The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the Government, Congress has generally adopted means any methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with. The statute authorizes no such proceeding, and the circuit court can exercise no such jurisdiction. *Passavant v. United States* (148 U. S., 214, 220).

The conclusiveness of the valuation of imported merchandise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. \* \* \* Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it, as where the appraisers are disqualified from acting, or have not examined the goods, or illegal items have been added independent of the value. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact or facts essential to their validity. *Muser v. Magone* (155 U. S., 240, 246).

Under the provisions of the law itself, and the interpretation given to it by the courts for a period of nearly 60 years, it would seem that the only question raised by the importers' protest which we can consider is, Did the appraising officers, in fixing the market value and wholesale price of the matting at the time of exportation to the United States in the principal markets of the country from which it was imported, exceed their powers, or, to use the language of the protest, did they proceed "on a wrong principle and transcend the powers conferred on them by statute?" To support this claim of the protest, counsel for the appellant insist that the evidence establishes—

First. That the local appraiser at New Orleans did not use all reasonable ways and means in his power to ascertain market value, as it appears from the testimony that after obliging the importers to present to him all papers and documents which tended to sustain the *entered* value, he decided to follow the valuation fixed on previous importations of the same kind of goods by the Board of General Appraisers acting as a reappraisal board, although believing that his appraisal would be reduced on appeal and the presentation of further evidence.

Second. That the appraisal made by the local appraiser was made of the actual market value and wholesale price of such matting at a date anterior to its exportation to the United States.

Third. That the valuation made on appeal to the general appraiser was made on a false idea as to the value of Hongkong currency, and that his appraisal of 20 $\frac{1}{4}$  cents a square yard in that currency was made in the belief that when converted into United States money it would give a valuation of 10 cents or less a square yard and thus entitle the goods to entry at the lower rate of duty.

Fourth. That the appraisal of 20 $\frac{1}{4}$  cents Hongkong currency a square yard made by the Board of General Appraisers, acting as a board of reappraisal on the appeal, was made on the basis of a valuation fixed by Board No. 3 for the same kind of goods exported anterior to the importation under consideration and in the belief that in the meantime Hongkong currency had not advanced in value—a belief which was not correct.

When analyzed, these contentions, with the exception of the second, finally resolve themselves into a claim that the appraisers wholly disregarded the evidence submitted by the importer, that they permitted themselves to be influenced by appraisements previously officially fixed by boards of reappraisal for the same kind of merchandise, that they were mistaken as to the value of Hongkong currency on the date of exportation, and that the conclusions reached were not warranted by the facts before them. Giving to the importer the full benefit of all these claims and admitting for the moment that

they are fully supported by competent evidence, nothing more can be deduced from them than that the board's decision was against the evidence, that it was not supported by the evidence, that the appraisers drew a wrong conclusion from the evidence, and that therefore their finding was erroneous. They do not show, or even tend to show, that the appraisers assumed or exercised a jurisdiction or power not conferred on them by law. Error or mistake made in the exercise of power and jurisdiction is one thing and the exercise of a power or jurisdiction not lawfully conferred is quite another.

From mistakes and errors made by the appraiser and general appraiser in the exercise of their power and jurisdiction to appraise, the statute provides the remedy of appeal to a board of general appraisers, and when that body has passed upon the appeal the door is closed by the express terms of the statute upon further inquiry into the matter. *Origet v. Hedden* (155 U. S., 228). To permit of a review of a decision of the appraisers on the ground that it was erroneous, that it was mistaken, that it was incorrect, that it was induced by a wrong conception of the facts, that the appraisers had not used good judgment, that they ignored facts which they should have considered or gave weight to evidence which should have been excluded, would overturn the whole system so carefully and wisely elaborated by Congress for the determination of values and the prompt collection of customs duties. Inquiry into value and the methods of reaching it must end somewhere, and when Congress decided that it should end with an appeal to the Board of General Appraisers sitting as a reappraisement board, its wishes in that behalf should be respected, especially as a judicial revision could afford no higher guaranties of a flawless judgment, no better security for a decision free from error, than does that of the system which the legislature saw fit to establish. Evidence that appraising officers were careless, or even irregular, in the performance of their duties falls short of showing that they assumed powers not conferred on them by the statute, and their valuation can not be impeached by evidence of that character. Neither is it competent to inquire as to whether the appraisers followed or disregarded the evidence produced before them. *Hilton v. Merritt* (110 U. S., 97, 107); *Auffmordtt v. Hedden* (137 U. S., 310, 325). Estimates of value require the consideration of many elements.

*How these various elements impressed the appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final, and could not be reviewed and the verdict of a jury substituted. The proper evidence of the decisions of the appraisers and of the collector was to be found in their official returns, and if they acted without fraud and within the powers conferred on them by statute, their decision could not be impeached by requiring them to disclose the reasons which im-*

*elled their conclusions* or by proving remarks they may have made in the premises. *Muser v. Magone* (155 U. S., 240, 251-252); see, also, *Origot v. Hedden* (155 U. S., 228, 235); *Chicago, Burlington & Quincy Railway Co. v. Babcock* (204 U. S., 585, 593).

The fact that a method of appraisement is employed which would lead to erroneous results and which could not be relied upon as a safe guide in any case does not nullify the appraisement. *Bartlett v. Kane* (16 How., 263, 271).

Appraisements have been reviewed where the appraisers were disqualified from acting, *and therefore had no power, authority, or jurisdiction to make them*. *Greely v. Thompson* (10 How., 225); *Oelbermann v. Merritt* (123 U. S., 356); *Mustin v. Cadwalader* (123 U. S., 369). They have been set aside by the courts when the appraisers have not examined or seen the goods which the law required them to examine or appraise and had therefore *failed to acquire in the manner prescribed by statute jurisdiction of the subject matter* upon which they were to exercise their discretion and judgment. *Greely's Administrator v. Burgess* (18 How., 413); *Oelbermann v. Merritt* (123 U. S., 356). They have been declared invalid by judicial tribunals where the appraisers, after finding market value and wholesale price, have, independent of such value, added on items which it was not their function, but that of the collector to determine and from the finding of which by the collector *an appeal to the courts is expressly allowed by the provisions of sections 14 and 15 of the act of June 10, 1890*. *United States v. Passavant* (169 U. S., 16, 19); *United States v. Klingenberg* (153 U. S., 93, 101, 104); *Badger v. Cusimano* (130 U. S., 39, 43); *Hilton v. Merritt* (110 U. S., 97, 106); *Robertson v. Frank* (132 U. S., 17, 24); *Oberteuffer v. Robertson* (116 U. S., 499, 515).

But these decisions have carefully refrained from impeaching the appraisement in so far as it related to the simple finding of market value, and even where "charges" have been considered by appraisers as an element and factor in reaching a conclusion as to such value the courts have declined to interfere. *Belcher v. Linn* (24 How., 508); *Passavant v. United States* (169 U. S., 16, 25).

If the official rate at which foreign currency is to be converted into money of the United States was an item to be considered by the appraisers in reaching a judgment, any mistake made by them as to the rate in force was a mistake of fact and as such is not reviewable. In this connection it may be said, however, that it is the duty of the appraisers to find market value in the currency of the country from which the goods are imported. (Customs Regulations, 1892, arts. 830, 845; Customs Regulations, 1899, arts. 1246, 1266.) The conversion of that value into United States currency is the duty of the collector and is made by him after the appraisement has been finally determined and reported. (Customs Regulations, 1892, art. 296; Customs Regulations, 1899, art. 409.) The appraisers

found the value of the matting to be 20½ cents Hongkong currency a square yard, which was the currency of the country from which the merchandise was imported. The collector converted that appraisement into United States currency admittedly at the correct official rate.

If the finding of the appraisers really and truly represented their best judgment, and it must be assumed that it did, 20½ cents Hongkong currency a square yard was therefore the correct value of the merchandise at the time of exportation in the country from which it was imported. What that value might become in the United States after it had been converted by the collector for the purposes of assessing duty was no concern of the appraisers, and any error under which they may have labored concerning it can hardly be held to have invalidated their appraisement. There is nothing in the evidence or in the record to warrant the claim that the final appraisement of the importation fixed its value as of a time anterior to its exportation. The fact that the Board of General Appraisers consulted with Board No. 3 as to valuations which it had fixed on previous importations of the same kind of merchandise shows no more than that the tribunal of final appraisement took previous valuations into account as an element to be considered in reaching its own decision as to actual market value, and is far from showing that the value finally determined upon was not the value at the time of exportation. Even if we were permitted to inquire into the methods employed by appraisers in coming to a decision, even if we could review the factors and evidence which induced them to make up their minds on the subject confided to their discretion and judgment by the lawmaking power, we would not be justified in holding that previous values of the same goods should have been entirely eliminated from consideration.

One of the most important reasons for the creation of a Board of General Appraisers was to secure through that body uniformity of appraisement and classification. To realize this purpose consultation between appraisers and general appraisers and between the different boards of general appraisers was not only a prudent and wise precaution, but a necessary one. Unaided by such consultation each board of appraisers might very well fix a different value on merchandise of the same kind exported from the same country at the same time, and that result at the very least would be provocative of appeals which might be avoided if the several appraisers and boards conferred before finally reaching a conclusion. (See Customs Regulations, 1899, arts. 1702, 1703, 1704, 1705, and 1711.)

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, having participated in the decision of the board, did not sit.



UNITED STATES v. GROSSFELD (No. 216).<sup>1</sup>

## DELIVERY PERMIT AS TO THE BULK AND A PART DESIGNATED FOR EXAMINATION.

The goods had been entered for consumption, 10 per cent of them designated for examination, a proper bond for the return of the delivered goods executed, a delivery permit as to those issued, all on August 5, 1909. On August 6 a delivery permit was issued for the goods designated and detained for examination: *Held*, the entire importation was dutiable under paragraph 250, tariff act of 1897.

United States Court of Customs Appeals, January 11, 1911.

APPEAL from a decision of the United States Board of General Appraisers, Abstract 23263 (T. D. 30601).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Chas. E. McNabb* on the brief), for the United States.

*Lester C. Childs* for appellants.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

It is agreed that the appellee imported at Nogales, Ariz., on July 19, 1909, certain dried peas and forwarded the same without appraisement, under the act of June 10, 1880, to Chicago, at which place it arrived August 4, 1909. It was entered for consumption, 10 per cent of the importation was designated for examination, a proper bond for the return of the delivered packages or any part thereof if demanded within ten days was taken, pursuant to Revised Statutes 2899, and a delivery permit issued to the importer for the merchandise not designated for examination, all on the 5th day of August, 1909.

On the 6th day of August a delivery permit was issued for the goods held for examination. The merchandise was held dutiable at 30 cents per bushel under paragraph 250 of the tariff act of July 24, 1897. The importers claim that it should have been assessed at 25 cents per bushel under paragraph 262 of the act of August 5, 1909.

The appellant claims that the duties were paid on the 5th day of August, 1909, while the appellee contends that such duties were not paid, but the estimated duties were deposited upon that day. No oral evidence was taken.

The importers appealed to the Board of General Appraisers, who held that as to the 90 per cent of the importation for which a delivery permit was issued August 5 the duty was properly assessed, and to that extent overruled the protest, but as to the 10 per cent ordered for examination and for which a delivery permit was not issued until August 6, sustained the protest and held that duty thereon should be assessed under paragraph 262 of the act of 1909.

The protest contained the allegation in effect that no delivery of any part of the shipment was taken until after the act of August 5,

<sup>1</sup> Reported in T. D. 31218 (20 Treas. Dec., 108).

1909, went into effect, and the importers claim that the goods were in continuous customs custody until August 6.

The merchandise is admittedly dutiable at the higher rate unless within the provisions of section 29 of the act of 1909, which reads:

That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

The act was approved August 5, 1909, and its final section provides that:

Unless otherwise herein provided this act shall take effect the day following its passage.

And it is agreed that, as relates to the issues in this case, the act took effect August 6.

It will be observed that section 29 refers to two classes of importations:

(1) All goods, wares, and merchandise previously imported for which no entry has been made.

And—

(2) All goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued.

The inquiry is, therefore, whether the importation in question falls within either of the two above classifications, as, if so, the protest should have been sustained, and, if not, the assessment of the collector was lawful.

As already appears, these goods were imported into this country on the 19th day of July, reached the port of delivery on the 4th day of August, and were entered for consumption on the 5th day of August, 1909.

We construe section 29 of the act of 1909, above quoted, as to the first class of goods therein provided for to mean that if no entry had been made before the 6th day of August, 1909, of goods previously imported they would be dutiable under the provisions of that act, but if the entry had been made, duty would be assessable under the act of 1897.

It being agreed that the goods were entered for consumption on the 5th day of August, they do not fall within the first classification if such an entry is one contemplated by that part of the section.

Without stopping to consider what the word "entry" may mean in some other connection, we think, for the purpose of the first part

of section 29 that when goods have been imported and the proper steps taken by the importer to enter the same for consumption, including the filing an entry paper as in this case, an entry thereof has been made so that they do not come within the classification first made in the section, as goods, etc., for which *no* entry has been made.

In *United States v. Legg* (105 Fed. Rep., 930) the court, in considering a question in some respects similar to the one before us, came to the conclusion that the word "entry" in section 33 of the act of 1897, of which section 29 is a reenactment, meant the document or entry paper filed or tendered by the importer.

Do the goods, although previously entered, fall within the second classification of the section?

Three conditions must be found to obtain before an affirmative answer to this question can be given: (1) The goods must be previously entered and under bond for warehousing, transportation, or any other purpose; (2) no duty paid; (3) no delivery permit issued.

Considering these prerequisites in their inverse order, it is clear as to 90 per cent of the goods these conditions do not *all* obtain, for as to so much of the importation a delivery permit was issued August 5, presumably at the importers' request. Their claim that the delivery of this 90 per cent was not taken until August 6 or later and that by reason thereof that part of the goods was in customs custody until August 6 or after is of no avail because the test under the statute is, had the delivery permit been issued, not had the delivery thereunder been taken, and the case as to 90 per cent of the importation might well be determined against the importers upon this fact alone. In addition, there is no evidence and no finding that delivery had not been taken under the permit.

We proceed, however, to consider the question as to whether duty had been paid, because its determination may affect the importers' claim that, as to the 10 per cent designated for examination, duty should be assessed under the act of 1909.

Relating to this question, the only statement contained in the record may be found in the protest and a letter of the collector of the port of Chicago to the Board of General Appraisers, dated October 13, 1909, submitting the protest, in which he says, relating to the importation:

It arrived here via Illinois Central Railroad on August 4 last and was entered for consumption and duties paid on August 5 last. Consumption entry No. 12991.

In their protest the importers say:

We respectfully protest against your decision of August 20, 1909, in assessing duty at the rate of 30 cents per bushel \* \* \* on certain 257 bags of dried peas \* \* \* under I. T. No. 76, entered and duties paid August 5, 1909, under consumption entry No. 12991. \* \* \* We therefore respectfully request that you reliquidate the entry and refund us the duties collected in excess.

The importers insist that the sum so paid should be treated as estimated duties deposited with the collector of customs, and that, because the decision of the collector finally fixing the rate of duty at 30 cents per bushel was not rendered until August 20, any payment before that time can not be said to be a payment of duty. In other words, that the payment of duty, strictly speaking, can not be made until by final liquidation the correct amount of duties has been ascertained.

No authorities are cited upon this question nor has our attention been called to any statute which undertakes to fix the time when payment of duties as such can be said to be made as distinguished from a deposit of estimated duties, if such a distinction exists.

In a general way, as we understand the law, when merchandise is brought into this country and destined for consumption here, the importer may place the same in bond, as provided in the statute, in which event he is not required to pay duty at the time of importation, but payment is deferred until the goods are withdrawn for consumption.

If intended for immediate consumption, the importer may deliver the goods into the possession of the customs officials, who proceed to make necessary examination and appraisement and assess the duty which must be paid before the merchandise will be delivered to the importer. The customs officials may also, when goods are entered for consumption, at the request of the importer, designate certain and not less than 10 per cent thereof as a sample for examination and appraisement, and give the importer a delivery permit for the balance, at the same time taking from him what is called a 10-day bond for the return of the goods so delivered if demanded. This gives the importer a right to the immediate possession of the goods covered by the delivery permit, subject to the conditions of the bond. This practice, we understand, quite generally prevails and was adopted in this case. But before he can obtain the goods on the delivery permit the importer must pay the duty that is fixed at the time, tentatively or otherwise, upon the entire importation. If the amount is deemed by him to be erroneous, his remedy at the proper time is to protest and appeal, if necessary, and if consequent upon protest or appeal a different rate is fixed, final liquidation follows pursuant thereto. But whenever the entry for consumption is made *eo instante* a debt has accrued from the importer to the United States. Whatever he turns over to the proper officials in discharge of that debt, we hold, is a payment thereon, subject, of course, to a final adjustment or liquidation when all questions necessary to the exact ascertainment of the amount have been legally determined. It may turn out to be a payment *pro tanto*, or it may turn out to be an overpayment, but payment, nevertheless, we think it is. Manifestly it is paid in recog-

nition and discharge of the obligation that the law imposes upon the importer whenever he enters his importation for consumption.

In the case at bar, the importation, as the importers were presumed to know, was subject to a specific duty per bushel of either 30 cents under the act of 1897 or of 25 cents under the act of 1909. The obligation to pay it was fixed when the goods were entered for consumption. The 30 cents per bushel was paid, not as a deposit for duty, but as duty within the meaning of the section. In reaching this conclusion, we only arrive at the same understanding which the importers had when they filed their protest, in which they referred to the *duties as paid* by them August 5.

It appearing that duty on the entire importation was paid and a delivery permit for 90 per cent thereof issued on August 5, it follows that 90 per cent at least of these goods was dutiable under the act of 1897. As to the 10 per cent of the importation in the collector's hands for inspection, and for which no delivery permit was issued until August 6, it is urged that a different rule obtains. This contention was sustained by the Board of General Appraisers, who rested their decision upon the supposed authority of *Hartranft v. Oliver* (125 U. S., 525), and that case is relied upon here.

The statute before the Supreme Court in that case was there stated as follows:

That all imported goods, wares, and merchandise, which may be in public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided for in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date.

The importation considered in that case reached the port of entry June 30, 1883, and on the same day was entered at the customhouse. It was not practicable on that day to remove the goods from the vessel into the public or bonded warehouse, and the next day, July 1, was Sunday, upon which day the act quoted, as to the importation, took effect, if at all. From the time the shipment arrived in port and entry thereof was made until after July 7, the vessel containing the merchandise remained with unbroken hatches and with a customhouse inspector in charge. The only question decided by the Supreme Court was that, under the circumstances of that case, the importation was not dutiable at any greater rate than it would have been if the goods had been in a public store or bonded warehouse on the 1st day of July, 1883. We are clear, in view of the facts in that case and the statute then under consideration, that the decision in the *Hartranft* case is not an authority in the case at bar. This 10 per cent sample

was held for inspection and appraisement until August 6. Entry thereof had been made and duty paid on the same the day before. It was not under bond for any purpose, but was a sample of the whole importation, which it was the duty and right of the customs officer to take and which the importers were bound to furnish. Its possession by the customs officers was but an incident to the importation, and although it sounds equitable to say that if the importers could not get possession of this part of their importation until the lower rate of duty attached, they should not be asked to pay the higher rate, yet the answer is that the statute does not make provision to that effect.

We hold that the entire importation was dutiable under the act of 1897, and therefore the decision of the board, that 10 per cent thereof was dutiable under the act of 1909, is *reversed*.

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VANDIVER v. UNITED STATES (No. 399).<sup>1</sup>

I. COMMON USE DETERMINES CLASSIFICATION.

An article imported may not be confined in use exclusively to the purpose for which it is imported and, if sold to persons who use it for other purposes, its classification is not thereby changed and the rate of duty should be assessed for its general and commonly known use.

2. SMOKERS' ARTICLES.

Cedar boxes of suitable size, plain and decorated, marked "Cigars" or "Cigarettes," are smokers' articles, and a finding by the Board of General Appraisers that other cedar boxes also of suitable size, of the same importation and similar in all essential respects to the boxes marked "Cigars" or "Cigarettes," though unmarked and possibly fitted for uses other than by smokers, are smokers' articles, will be sustained.

3. GLASS AND CHINA WARE.

Articles of bronze and glass and china, such as inkstands, stamp boxes, etc., where the component material of chief value is metal, are dutiable under paragraphs 96 and 100 of the tariff act of 1897.

United States Court of Customs Appeals, January 11, 1911.

APPEAL from a decision of the United States Board of General Appraisers (T. D. 29442; T. D. 29644).

[Modified and affirmed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts of counsel), for appellant.  
*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

The appellant, John L. Vandiver, imported certain boxes, which were classified under the provision in paragraph 459 of the tariff act of 1897 as smokers' articles. Duty was assessed at 60 per cent ad valorem. Appellant also imported certain other articles, which were classified under paragraphs 96 and 100 of the aforesaid tariff

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<sup>1</sup> Reported in T. D. 31219 (20 Treas. Dec., 113).

law as decorated china and decorated glass, respectively, and duty thereon was assessed at 60 per cent ad valorem. The importer protested, alleging that the boxes were dutiable at 35 per cent ad valorem, under paragraph 208 of the tariff act of 1897, as manufactures of wood, and at 35 per cent, under paragraph 450 of said act, as manufactures of leather, and that the articles classified as decorated china and decorated glass were dutiable at 45 per cent ad valorem, under paragraph 193, as manufactures of metal.

The Board of General Appraisers sustained the importers' protest as to certain articles illustrated by item 3101, Exhibit 8; item 2839, Exhibit 10; item 3146, Exhibit 9; and item 2851, Exhibit 12, of the decorated china and decorated glass importations, but overruled the protest as to all other items. Thereafter a rehearing was granted, and as a result, the Board of General Appraisers sustained the protest as to certain bone charms, items 3162 and 3163, Exhibit 1, but overruled it in all other respects. The effect of the final decision of the board was to reaffirm the decision originally made, except as to the bone charms.

We quote the provisions of the tariff act of 1897, which are material to the case:

Par. 96. All other china, \* \* \* and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if \* \* \* decorated \* \* \* in any manner. \* \* \*

Par. 100. Glass bottles, decanters, or other vessels or articles of glass, \* \* \* decorated, \* \* \* and any articles of which such glass is the component material of chief value. \* \* \*

Par. 193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured. \* \* \*

Par. 208. \* \* \* Manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act. \* \* \*

Par. 450. Manufactures of leather, \* \* \* or of which these substances or either of them is the component material of chief value, not specially provided for in this act. \* \* \*

Par. 459. \* \* \* And all smokers' articles whatsoever, not specially provided for in this act, including cigarette books, cigarette book covers, pouches for smoking or chewing tobacco, and cigarette paper in all forms. \* \* \*

Some of the articles are cedar boxes, plain and decorated, which were invoiced as bonbon boxes, jewelry boxes, card boxes, etc. The appellant claims that such boxes are not smokers' articles, but are dutiable at 35 per cent as manufactures of wood under paragraph 208, heretofore quoted.

The boxes used as exhibits, and said to be samples, are made of cedar with brass trimmings. Some of them are about 8½ inches long by about 6 inches in width; others are 4 by 8 inches. Upon the cover of one of the larger boxes the word "Cigars" appears in brass script.

Another exhibit of about the same size as the box just referred to, and made generally in the same way, has no word or letters upon it, but has a fancy picture of an English stagecoach. There is one smaller box, also made of cedar with metal bindings and leather coverings. Upon one of the smaller boxes the word "Cigarettes" appears in brass script upon the cover; upon another there is a small fancy picture and no lettering. The boxes are all of the same general character, the larger ones being identical in construction.

In the larger boxes, those marked "Cigars," as well as those with pictures but no words, there are sliding partitions, which one of the witnesses said enabled two brands of cigars, or cigars and cigarettes, to be kept in the same box. The witness said, however, that in the boxes which had no lettering upon the outside the partition was not for the same purpose as in the boxes marked "Cigars," and that the unmarked boxes had been sold for jewelry boxes, stationery, and papeteries, "also for cigarette boxes, if they are bought for that purpose." Witness said that in his store all the "wood goods" were kept together, whether the covers were for jewelry or cigars. He also said that while cigar boxes were sometimes lined with porcelain, zinc, copper, and wood, cedar was the wood generally used for cigar boxes, and he admitted that possibly three out of five boxes such as those with cedar partitions and marked "Cigars" were sold for cigar boxes, while the smaller ones, not marked, were sold for numerous purposes, but generally for holding cigarettes, although boxes with metal trimmings, like one of the smaller size not marked, were more frequently sold for jewelry; that if asked for fancy boxes, any of the boxes not marked "Cigars" or "Cigarettes" would be shown.

An examiner of merchandise at the port of New York, also called by the importers, testified that he had looked at the samples as represented by the boxes, and that the practice was to return such articles as smokers' articles. He gave it as his opinion that wood was the chief component value of all the boxes except one of the smaller ones, of which metal was the chief component value.

The articles of bronze and glass and bronze and china are inkstands and boxes suitable for stamps, bonbons, pen trays, etc. The evidence concerning these is that the component material of chief value is the metal; one witness, an examiner of merchandise at Philadelphia, saying that the value of the metal was two-thirds of the value of the whole.

W. M. Stewart, a salesman in a firm which imports stationery, fancy goods, smokers' boxes and trays, desk sets, and things pertaining to the fancy-stationery business, testified that the several exhibits, 8, 9, 10, 11, and 12, represented items covered by the invoice. Exhibit 8 is a glass inkstand decorated with metal top and bindings. Exhibit 9 is a small glass tray, fitting into a stand made of delicate brass. Exhibit 10 is a decorated china penholder tray, with elab-



orate bronze mountings, suitable for a writing desk. Exhibit 11 is a glass stamp box with a brass lid, the whole fitting into a brass stand. Exhibit 12 is a circular glass box,  $3\frac{1}{4}$  inches in diameter, divided into four compartments by glass partitions. The box has a glass cover, upon which appears metal ornamentation; the cover being fastened to a band cemented to the box itself. The sides are also ornamented with metal, the whole box resting upon small brass supports attached to a metal band surrounding the base of the box.

It is very plain that the boxes marked "Cigars" and "Cigarettes" are intended for cigars and cigarettes, respectively. Having a cedar box of appropriate size and marked "Cigars" or "Cigarettes," at once we associate the article with its usefulness for persons who smoke. Indeed, its chief purpose is so apparent that there is no real room for discussion. It is designed for smokers, is commonly used for their convenience, and is a smoker's article. *Steinhardt & Bro. v. United States* (126 Fed. Rep., 443).

Classification of the other boxes is not so simple. They are, however, with the exception of the small box covered with leather, of the same kind of wood and of the same sizes and style as the marked boxes. The larger boxes have the same style of partition in them, but, as stated, instead of script ornamentation, have pictures of an English stagecoach upon the covers. It is true, no doubt, that the cedar boxes could be used for jewelry, bonbons, and trinkets, and that they could be sold as fancy boxes for such purposes. But, on the other hand, it seems unlikely that a jewel box would be without lock and key, and altogether unreasonable that a candy box would be made of cedar, or that it would have a sliding tray, such as the exhibits have. They appear to be boxes designed for cigars and cigarettes. So does the box with the leather covering. It likewise is of cedar and of suitable size for cigarettes.

The testimony of the importer is not that these various boxes are not used and sold for smokers' uses, but that they are sold for numerous purposes, and that he "supposes" a majority of the smaller ones are sold for cigarettes.

To these statements, as well as to all other evidence upon the two sides of the case, the board are presumed to have given attention, and we believe that they were justified in finding that all the boxes were smokers' articles, were suitable for use by smokers, and were imported to be generally sold for such purpose. This would require us to sustain the finding of the board, for it is laid down that exclusive use is not the criterion; that is, that although an article is not used exclusively for the purpose for which it is imported, and, in fact, is sold to persons who may use it for other purposes, it is none the less dutiable at the rate prescribed in the specific provision covering it in its general and commonly known use. *Worthington v. Robbins* (139 U. S., 337); *Magone v. Wiederer* (159 U. S., 555); *Isaacs v. Jonas* (148 U. S., 648).

We believe that the decorated china and decorated glass classifications were properly made as to all items considered, except item 3148, Exhibit 11, the hereinbefore described glass stamp box with brass lid attached. With respect to that, if paragraph 193 is applicable to items 3101, Exhibit 8, 3146, Exhibit 9, and 2839, Exhibit 10, it must cover item 3148, Exhibit 11, inasmuch as the metal thereof is of chief value and an essential part of the stamp box, and is not elsewhere specially provided for.

The decision of the board sustaining the protest specifically designated the items to which the decision became pertinent. We must modify the decision so as to make it extend to item 3148, Exhibit 11—the stamp box, as heretofore indicated—but when so extended, the decision can apply only to the exhibits identified on the invoice by number. It would not do to hold that the exhibits are representative samples of groups of invoice numbers, for the evidence does not so warrant, particularly as there is a specific objection to the board's receiving the samples as illustrative of any articles except those to which the numbers which they have been said to represent pertain.

The decision of the board is therefore modified so that it will include, in addition to the order sustaining the protest as to the items 3101, 2839, 3146, and 2851, item 3148 (Exhibit 11), and, as so modified, the decision is *affirmed*.

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#### UNITED STATES *v.* HATTERS' FUR EXCHANGE (No. 4).<sup>1</sup>

##### 1. DOUBT RESOLVED IN FAVOR OF IMPORTER.

Where from the evidence there may be a doubt whether an article falls within one of two classifications, the doubt will be resolved in favor of the importer.

##### 2. DESCRIPTION *EO NOMINE*.

Where an article is designated *eo nomine*, whether for duty or to be free of duty, such designation must prevail over words of a general description.

##### 3. UNRESSED SCRAPS OF FUR.

Fur gathered as scraps or waste from the first treatment of skins is not waste in the strict sense of refuse, but is undressed fur and as such was free of duty under section 561, tariff act of 1897.

United States Court of Customs Appeals, January 18, 1911.

TRANSFERRED from United States Circuit Court of Appeals, for Second Circuit,  
Abstract 16813 (T. D. 28429).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief),  
for the United States.

*B. A. Levett*, for the appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

In 1905, the Hatters' Fur Exchange imported into New York certain merchandise which was returned by the local appraiser as

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<sup>1</sup> Reported in T. D. 31237 (20 Treas. Dec., 143).

"fur not on the skin prepared for hatters' use." The collector assessed duty at the rate of 20 per cent ad valorem, under paragraph 426 of the tariff act of 1897, which provides that:

426. Furs, dressed on the skin but not made up into articles, and furs not on the skin, prepared for hatters' use, including fur skins carroted, twenty per centum ad valorem.

The importer objected to the classification and assessment, claiming that the merchandise was dutiable under paragraph 463, which reads as follows:

463. Waste, not specially provided for in this act, ten per centum ad valorem.

Or, that it was entitled to free entry under paragraph 561, which reads as follows:

561. (Under the heading "Free List") Furs, undressed.

Or, that it should be admitted free under paragraph 664, which reads as follows:

664. (Under the heading "Free List") Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act.

The collector's decision was reviewed by the Board of General Appraisers and in part sustained, in part overruled. The importer then appealed as to all the protests it had filed, and Judge Martin, sitting in the Circuit Court of the United States in and for the Southern District of New York, modified the decision of the Board of General Appraisers by holding that all of the merchandise was entitled to free entry under paragraph 561 as furs undressed, except certain exhibits, marked 1 and 2, with respect to which the board's view was affirmed. The importer, however, waived its claim as to such goods as were illustrated by the exhibits 1 and 2 referred to, because Judge Hough, sitting in the United States Circuit Court in and for the Southern District of New York, had held in *United States v. Hatters' Fur Exchange* (T. D. 27971) that such merchandise was "waste."

The United States is now before this court praying for a reversal of the judgment of the circuit court as ordered by Judge Martin.

Ten exhibits accompany the record, and it is largely to them that the testimony of the witnesses is addressed. The importer called but one witness, Joseph P. McGovern, who said that he was connected with the Hatters' Fur Exchange; that he knew the articles covered by the invoices in the case, and that he had had over 10 years' experience in preparing fur from the first stages, or from the time that it is on the raw skin, up to the time when it is ready for hatters' use. When his attention was called to Exhibits 1 and 2, and to the decision of

Judge Hough, in the case of *United States v. Hatters' Fur Exchange* (supra), witness said that Exhibits 1 and 2 were of the same character as the merchandise which was involved in the decision of Judge Hough; that Exhibit 1 was combings, and that Exhibit 2 was "poussiere" or "box waste"; that what was usually called waste is the short material that drops from the skin while it is going through the cutting machine—a very short fiber that is between the pelt and the fur itself that is put into a hat; that combings came in various qualities; that the importations of the so-called combings contain both fur not prepared and hair mixed. Exhibit 1 was marked as a sample of hare combing, and Exhibit 2 was marked as a sample of the cony or rabbit combings.

Witness said that the sample marked "Exhibit 3" was heated fur or "poil echauffe," of the same character as the merchandise furs not on the skin not prepared for hatters' use, passed upon by the Board of General Appraisers in the protests of *The Hatters' Fur Exchange* (Inc.), G. A. 6246. "Poil chiquettes," which were also entered upon the invoice, were described as produced by being blown from the pieces of rabbit skins and as consisting of fur and hair. "Poil gras" was described as greasy fur, obtained after the bales of furs are compressed, the compression causing grease to ooze through the pelts and to get into the fur. Fur in this condition can not be used by a hatter until it is thoroughly cleansed of the grease. "Poil lapin blanc veule" was described as pieces taken from the white rabbit or fur prepared for hatters' use. Witness said that the importer made no claim as to such fur. "Poil echauffe secrete," sample of which appears as Exhibit 5, was regarded by the witness as waste, similar to heated fur, and carroted. Exhibit 6 was described by the witness as raw tails of the rabbit, fur and hair, all but the bone. They are sold under the name of raw cony tails.

Rabbit snips was the designation applied to certain of the exhibits marked "7" and described as fur on the skin—that is, on pieces of the skin after it is carroted. The tails of the rabbits as they appear after carroting were described as raw heated fur, similar to Exhibit 3. The witness described certain other exhibits, among them one (No. 8) called greasy carroted fur, and said that snips consisted of the stuff that is left after the fur is cut off of the pelt or the bone. "Lat-tones" were raw pieces, like Exhibit 7. "Dags" were described as sweepings off the fur, consisting of the dirt and particles of fur that fall off the skin and are brushed off the floor. Witness said that "brossage" is the stuff that is brushed off the skin after it is carroted in the drying carrot; that the fur sometimes sticks together—or the hair, rather, and it has to be brushed off, so as to free the hair or fur

for the hatter. "Pullings" of the rough hair, according to Mr. McGovern's evidence, are called rabbit down raw and are not used for hatters' purposes at all, but for stuffing pillows. "Culees" are raw pieces similar to Exhibit 7. Witness said that in his opinion the sample represented by Exhibit 5 had been steeped in some preparation to make it look like the carrot which is applied to the best fur that hatters use, and that all that would be necessary to render it fit for use would be to have it cleaned and cleared like cony waste, and then it could be put in as an adulterant, but that by itself it could not be used.

The United States called Henri Picard as a witness. He said he had had 19 years' experience in dealing with hatters' furs; that he had examined the samples offered in evidence, and that he would call Exhibit 5 a bit of pot-carroted, heated fur; that it had been carroted after it had become heated, and was prepared for hatters' use; but witness afterwards admitted that it would have to be blown to be ready for hatters' use; that hatters' fur could not be made out of it without mixing it with something else. Mr. Picard said that the merchandise represented by the various other samples was all waste by-products, obtained in the preparation of skins; that all of the exhibits were furs; that the fur represented by Exhibit 5 was what is called heated fur that comes when they plug the skins—fur that is torn off the pelt; that it falls on the ground, is picked up and put through a process called pot carroting, applied to the pelt. It was the opinion of the witness that Exhibit 5 had been through some process toward preparing it for hatters' use, the process having been a solution of nitric acid used in carroting.

With this evidence before the court, the case has been somewhat simplified by the fact that counsel for the respective parties agree generally that it proves the articles involved to be a waste. We can therefore move forward upon this assumption, and at once proceed to the question whether, being waste, they are clippings or refuse scraps and pieces, dutiable merely as waste not specially provided for or whether, although waste, they are yet articles of undressed fur specially provided for under the paragraphs of the tariff act of 1897 heretofore quoted.

The collector and the board were of opinion that the merchandise is fur; and there is ample evidence to sustain their finding to that effect. As generally understood, fur removed from the skin must be prepared before it can be felted. The long hairs are cut off and the true fur removed by the action of a knife. So, too, the pelts are often greasy and have to be cleansed before shearing. Carroting, a process of heat action, combined with sulphuric acid, is much resorted to in order to increase the felting property of fur. But it is with and to fur that

these and other things are often done, according to the needs of the manufacturer. The finding of the Circuit Court that the articles are undressed clippings of rabbit skins, and portions of fur that have become detached from the pelt by reason of heat and other means, is amply sustained by the evidence, and, as was said by Judge Martin, the evidence shows that they are all "used for the same purpose to which the skin as usually cut up is employed and that it comes from the rabbit pelt, which of itself is treated as free under the tariff act."

It is waste in a sense—that is, it is primarily a refuse in so far as the first treatment of the skin goes, and it may be that the object of the first treatment of the skins is not to obtain this refuse; it is a residuum. But, on the other hand, it is not at all a worthless quantity, as it has a commercial value for use in hatmaking, and is imported for such purposes. The intent of the tariff law of 1897 was explicitly expressed by providing for free entry of skins and furs undressed, and it would seem to us that it was not meant to impose duty upon pieces or inferior kinds of furs, themselves valuable, and gathered as the scraps or waste from the first treatment of the skins, for they are still furs undressed.

At all events, the most favorable view for the Government that can be deduced from the evidence is that the question whether the articles are truly within the term furs undressed or waste in the strict sense of refuse, and as contemplated by the statute as not provided for, is one of substantial doubt. Under such circumstances the difficulty is resolved by the aid of the rule that in construing a tariff law, where there appears to be an equal and substantial balance between alternatives, the doubt should be resolved in favor of the importer. *American Net & Twine Co. v. Worthington* (141 U. S., 468); *Eidman v. Martinez* (184 U. S., 578).

We are not unmindful of several rulings of the Board of General Appraisers and of the courts cited to us, where it would appear that articles similar to those herein involved have been classified as waste, but as we read the words of the statute, we do not regard the rule of contemporaneous construction as wholly persuasive in the case.

We hold that the articles, though waste in a narrow sense, are still fairly within the term "furs undressed," and as such are free of duty. And we affirm the circuit court in following the rule laid down in *Chew Hing Lung v. Wise* (176 U. S., 156), to the effect that where an article is designated *eo nomine*, whether for duty or to be free of duty, such designation must prevail over words of a general description, which might otherwise include the article specially designated.

*Affirmed.*

OELRICHS v. UNITED STATES (No. 57).<sup>1</sup>

## MOTION FOR RETURN OF A COMPLETE COPY OF EVIDENCE.

Where testimony was offered before a classification board and excluded by order of the board over objection taken, for this court to determine the propriety of the exclusion, all the testimony so excluded should be incorporated in the record on appeal.—*Harris v. United States* (177 Fed. Rep., 475) distinguished.

United States Court of Customs Appeals, January 18, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
Abstract 19797 (T. D. 29306).

[Motion granted.]

*Comstock & Washburn* for the motion.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* of counsel), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers classifying an importation of wool on the basis of value as fixed by the reappraisement board on appeal from the general appraiser. A motion is now made for an order requiring the board to return a complete copy of the evidence offered before the board upon the present hearing, which consisted of the evidence which had been offered before the reappraisement board. This was not returned with the record for the reason that the board regarded it as no part of the record of this proceeding.

There is an alternative request that in lieu of this order the board be required to strike from the record certain irrelevant portions of pages set forth in the affidavit accompanying the motion.

It is enough to say of the last request that the return of the board and the affidavit of counsel representing the Government apparently meet the case made by the appellant. The question is narrowed down, therefore, to whether where testimony is offered before the classification board and is excluded by order of the board and exception taken, that testimony may be required to be returned for the purpose of enabling this court to judge as to the propriety of its exclusion.

The testimony which was offered was claimed to be the entire testimony taken by the Board of General Appraisers on an open hearing, and it was claimed that this would show that the board illegally and without authority fixed the value of the goods. This is not the time to discuss the merits of the case, as they have not been presented. But all that is involved is the question of practice.

The statute, section 29 of the act of 1909, confers upon this court the power to review final decisions of a Board of General Appraisers

<sup>1</sup> Reported in T. D. 31238 (20 Treas. Dec., 147).

in all cases as to construction of law and facts and provides that an application shall be made to this court containing a concise statement of the errors of law and fact complained of, and that "thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case, and their decision thereon;" \* \* \* that "the court shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case, with such orders as may seem to it proper in the premises, which shall be executed accordingly."

Obviously this court would find difficulty in determining whether an exception to the ruling excluding testimony should be sustained or overruled without something in the record to inform the court as to what the testimony excluded consisted of. It might or might not be error to exclude the record of the proceedings before the board of reappraisement. In this case, upon the ruling made excluding the testimony, an exception was noted by the importer. Unless we should hold that the ruling of the board of classification was final and conclusive in such a case, it would seem to follow that this court ought to be able to inform itself as to what the ruling imported.

The case of *Harris v. United States* (177 Fed. Rep., 475) is relied upon as sustaining the action of the board in declining to return this testimony. We have examined that case and find nothing to indicate that any exception was noted to the ruling of the board excluding the testimony. Certainly the ruling of the court in that case is not authority for the action of the board in the present case in refusing to return the offered testimony. It was said in that case:

If the record in the reappraisement of proceedings is admissible as evidence in this protest proceeding (a question which is not before this court at this time), the importer in the present case might have adopted two courses: He might have excepted to the ruling of the board and brought the question before the court in his assignments of error, or he might have offered this record as additional evidence taken in this court under the provisions of section 15.

The latter remedy suggested is not open in this suit, as this court does not receive additional evidence. But the remedy of bringing the question before this court for review of the ruling excluding testimony we think is open to the appellant, and we think that for a correct understanding of the force and effect of the ruling we should have before us the offered evidence.

The order prayed for will be granted.

DE VRIES, Judge, did not participate in the hearing or decision on this motion.



BLIVEN v. UNITED STATES (No. 58).<sup>1</sup>

## SUFFICIENCY OF PROTEST—VASELINE—PARAFFIN.

Where the importer claimed his importation was dutiable as petroleum under tariff act, 1897, at the rate of duty imposed by Germany on petroleum, and it appeared the rate was levied on the importation as paraffin and as vaseline oil, each of which was then dutiable at other and differing rates in Germany, a protest as to petroleum alone is not sufficiently exact; it does not show that that which was in the mind of the protesting importer was brought to the knowledge of the collector.—Citing *Carter v. United States*, *supra*, p. 64 (T. D. 31033).

United States Court of Customs Appeals, January 18, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 27550).

[Affirmed.]

*Walden & Webster* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The point at issue in this case is the validity of two protests.

The issuable portion of the protests, which are, except as to particulars noted, identical in language, is as follows:

Protest is hereby made against your decision assessing duty at 1.426 cents per pound or other rate or rates on certain paraffin liquid (vaseline oil) covered by entries below named. The ground of objection, under the tariff act of July 24, 1897, is that said merchandise is free of duty under paragraph 633, or if not, then at 0.2852 cent per pound, as it is made in Germany from Russian petroleum; or if not, then at the rate imposed by Germany on petroleum imported into that country or at the appropriate rate and under the proper paragraph according to the component material of chief value.

The return of the collector was the same, except as noted in each case, and contained the following statement:

An inspection of the invoice and entry shows that the merchandise in question was imported from Germany, and was returned by the appraiser as "paraffin oil" (vaseline oil). According to the declaration of the manufacturers and sellers, attached to the invoice, it would appear that the merchandise was refined in Germany from crude petroleum produced in Russia.

This office, in the liquidation of the entry, charged a countervailing duty (1 ruble per poood) equal to the duty imposed by Russia on a similar product imported into Russia from the United States, in accordance with the proviso to paragraph 626, act of July 24, 1897, and T. D. 25457. Note T. D. 19263 as to rates charged by various countries.

T. D. 19263 reads as follows:

*To officers of the customs and others concerned:*

The proviso to paragraph 626, act of July 24, 1897, provides that "if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any other country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country."

The appended schedule of the countries imposing duty on crude petroleum and its products, and the respective rates of duty so imposed, is published for your information and guidance.

O. L. SPAULDING, *Assistant Secretary*.

<sup>1</sup> Reported in T. D. 31239 (20 Treas. Dec., 149).

*	*	*	*	*	*	*
GERMANY.						
*	*	*	*	*	*	*
Paraffin, per 100 kilos, 10 marks.						
Petroleum, crude or refined, per 100 kilos, 6 marks.						
*	*	*	*	*	*	*
Vaseline, scented, per 100 kilos, 20 marks.						
*	*	*	*	*	*	*

The United States Court of Appeals for the Second Circuit, in the case of *United States v. R. F. Downing & Co.*, and *Same v. Schoellkopf, Hartford & Hanna Co.* (146 Fed. Rep., 56), after citing the following:

Paragraph 633 of the tariff act of 1897 reads as follows:

633. Paraffin.

The pertinent proviso to paragraph 626 is in the following language:

626. \* \* \* : *Provided*, That if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country—

held that the proviso to paragraph 626 was also intended by Congress as a proviso and limitation upon paragraph 633. To be precise, the language of the court is as follows:

Manifestly, Congress sought to introduce reciprocity in petroleum products by discriminating against any country which discriminated against the United States; it has used language apt to express that intent, and we see no reason why the proviso should not be read into every section of the tariff act which enumerates a product of petroleum. The two sections may fairly be read together to effect such intent, as follows:

“Articles known commercially as paraffin shall have free entry, but if any of them is a product of petroleum—a product of which crude petroleum is the component of chief value—and was produced in a country which lays duty \* \* \* it shall pay an equal duty.”

The Board of General Appraisers overruled these protests on the ground that they were insufficient. We think the board did not err. It will be noted, as announced in T. D. 19263, the duties imposed by Germany upon paraffin, petroleum, and vaseline differ as to rates. The importer in his protest did not claim the rate of duty applicable to *paraffin* in the one case or *vaseline* in the other case, but the rate of duty imposed by Germany upon *petroleum*.

It has been uniformly held by the courts that where a genus and species were both named in the tariff act it will not suffice in the protest to rely upon that relationship and allege a rate applicable to merchandise therein other than of the name intended to be counted upon for judgment. That in tariff legislation the genus and species are regarded as separate and distinct legislative subjects, and must be so regarded in the administration and construction of tariff laws, is well

settled in the case of *Arthur v. Lahey* (96 U. S., 112), wherein the Supreme Court of the United States uses the following language:

When Congress has designated an article by a specific name, and by such a name imposed a duty upon it, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it. *Homer v. Collector* (1 Wall., 486); *Reiche v. Smythe* (13 id., 162); *Smythe v. Fiske* (23 id., 374); *Movius v. Arthur* (95 U. S., 144).

In *Chung Yune v. Kelly* (14 Fed. Rep., 639) the Circuit Court for the District of Oregon applied this principle to protests. The protest alleged the merchandise to be sago flour, and the court found it to be cassava, or root flour, and said while this was a species of sago flour the protestant could not recover, because, states the court—

The goods were entered by the plaintiff as sago flour and he protested against the payment of duties upon that ground alone, \* \* \*. The burden of proof is upon the plaintiff, and before he can recover he must prove the truth of his allegation and protest that this article is sago flour. \* \* \*. When an article is designated in an act of Congress by a specific name, general terms in the same or a subsequent act, although broad enough to comprehend it, are not considered applicable to it.

More precise was the point decided in *Smith and others v. Schell and others* (27 Fed. Rep., 648). The gist of the case is concisely set forth, as far as pertinent, in the syllabus, which states:

But if this merchandise is shown to be a manufacture of a material bearing another name than the material of which the manufacture named in the protest is composed, and the tariff act makes a clear and positive distinction between these materials by imposing thereon *eo nomine* different rates of duty, the court, in considering the tariff act, will make the same distinction, although the name of the second material is the name of the genus, and the name of the first is the name of a species thereof; and the claimants are not entitled to recover.

See also *In re Clafin & Co.* (47 Fed. Rep., 875).

These cases, it seems to us, describe a rule that is not alone sound but in perfect accord with the fundamental principles underlying the sufficiency of protests, as heretofore announced by this court in *Carter v. United States* (*supra*, p. 64; T. D. 31033). The cardinal rule laid down in that case, with reference to the sufficiency of protests, is:

A protest \* \* \* is sufficient, if it shows fairly that the objection afterwards made at the trial *was in the mind of the party and was brought to the knowledge of the collector*, so as to secure to the Government the practical advantage which the statute was designed to secure.

It will be noted that upon paraffin Germany imposes a duty per 100 kilos of 10 marks; upon petroleum, crude or refined, 6 marks; upon vaseline, scented, 20 marks.

The proviso to paragraph 626 adopts for dutiable purposes the tariff law of Germany in such cases as these. That law may be regarded for the purpose of present consideration as part and parcel of the tariff act of 1897. It bears a separate and distinct rate of duty upon paraffin, petroleum, and vaseline.

The importer alleges in his protest that the applicable rate of duty was that levied by Germany upon *petroleum*. It is now admitted in

this record that the rate invoked was the rate levied upon *paraffin* in the one case and *vaseline oil* in the other, separate and distinct rates. The cardinal principle underlying the sufficiency of protests being that the protestant must *direct the mind of the collector to the appropriate provision of law*. It can not by any stretch of imagination be said that this requirement is satisfied when the protestant directs the mind of the collector to some other provision of law assessing a different rate of duty. Such is a more violent contravention of the requirement because it not only does not leave the mind of the collector free to determine for himself the appropriate provision but carries his mind away from the applicable clause to an inapplicable one, and thus confuses the situation. Such is the case here presented.

*Affirmed.*

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STEGEMAN v. UNITED STATES (No. 458).<sup>1</sup>

1. POWER TO REMAND TO HAVE ADDITIONAL TESTIMONY TAKEN.

The power to remand a case for the purpose of having additional testimony taken is not incident to the right of appeal itself, but must depend upon express statutory authority.

2. *IBID.*

The organic act establishing this court embodies all provisions relative to appeals to this court now in force, and in determining whether the authority to remand a cause and direct a rehearing resides here, the provisions of the organic act are decisive.

3. *IBID.*

There is no such authority directly conferred by that act, it may not be brought in by construction, and the terms of the statute contemplating as speedy a determination of causes here, as properly may be, a motion to remand to take additional testimony will be denied.

4. RULE 11 OF THIS COURT.

Rule 11 of this court relating to amendments, orders, and judgments should be construed in connection with the statute giving authority to remand a case to the board by an order made on the final hearing before this court. If open to a broader interpretation, it must be held that in so far as it attempted to extend the power of the court beyond the limit here prescribed it was in excess of authority.

United States Court of Customs Appeals, January 18, 1911.

APPEAL from decision of the United States Board of General Appraisers (T. D. 30828, post-card views).

[Motion denied.]

*Comstock & Washburn* (Albert H. Washburn of counsel) for the motion.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

An appeal having been taken to this court from a decision of the Board of General Appraisers, an application has been made for an

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<sup>1</sup> Reported in T. D. 31240 (20 Treas. Dec., 153).

order remanding the case to the Board of General Appraisers with instructions to hear additional evidence therein and return the same to this court.

This application presents the important question of the power of this court to direct a rehearing of a case before the Board of General Appraisers, as the testimony proposed to be introduced is claimed to be in the nature of newly discovered testimony, and its production would call for a rehearing of the case and a new decision by the Board of General Appraisers, unless, indeed, we should be of the opinion that we have the power to take testimony for the use of this court which has not been brought to the attention of the Board of General Appraisers for action, and an opportunity given them to pass upon it.

A brief reference to the state of the law before the enactment of the act of August 5, 1909, is essential. Under the administrative act of June 10, 1890, authorizing appeal from the decisions of the Board of General Appraisers to the United States circuit courts, authority was given to the circuit courts at any time within 20 days after the return to refer it to one of the Boards of General Appraisers as an officer of the court to take and return to the court such further evidence as might be offered. Under this statute the practice of trying the case piecemeal became so common and found such disfavor with the courts that in 1908 the statute was amended by the act of May 27 of that year (35 Stat. L., 403), and provision was made as follows:

That the said circuit court is further vested with the power to remand any case pending before it on appeal from a decision of the Board of General Appraisers when, in its opinion, such proceeding is just and proper, but this shall not be ordered except upon motion duly made and after notice to the opposite party. When such order is made the case shall then be remanded to the Board of General Appraisers whose decision has been appealed from, and the said board shall hear such further testimony as shall be introduced by either party, and shall return to the circuit court the additional evidence so taken, together with a further certified statement of facts as supplemented or modified by such additional testimony, and their decisions upon the whole case as thus supplemented or modified, which said additional return shall be added to and become part of the record upon which the case shall be heard and determined by the circuit court.

This being the state of the law as to practice on appeals, Congress addressed itself to the enactment of the statute of 1909. By section 28 of that act it is provided that "the act to simplify the laws in relation to the collection of revenues, approved June 10, 1890, as amended, be further amended to read as follows:" This is followed by a complete revision of the customs administrative act, so called, of June 10, 1890, and eliminates wholly the provision above quoted, which was added to that act by amendment in 1908.

It is also provided by section 41 of the act of August 5, 1909, that the act to simplify the laws in relation to the collection of revenue,

approved June 10, 1890, as amended, "is not hereby repealed but amended so as to read as in this act provided."

These enactments left no room for construction. All of the act of June 10, 1890, not embodied in the tariff act of 1909 was abrogated and repealed. The provisions kept in force were directly embodied in the tariff act of 1909. It results, then, that we must look to the organic law creating this court to ascertain the intent of Congress as to the question here presented.

For convenience we quote at length the provisions which we deem to have application on this question. It is provided in section 29, after providing for the institution of this court:

After the organization of said court no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this act. \* \* \*

The Court of Customs Appeals established by this act shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases.

It is further provided that in case of dissatisfaction with the decision of the board, the defeated party may—

apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: \* \* \*

Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of, and a copy of said statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination. \* \* \*

Said Court of Customs Appeals shall have power to review any decision or matter within its jurisdiction and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

It will be seen that there is no direct authority conferred upon the court to remand a case to the Board of General Appraisers for the

purpose of taking testimony in advance of a decision by this court. It would be only by a strained construction that by implication the authority to take testimony in this court could be implied, and there is much in the provisions of the act which precludes any such implication. If any one purpose is manifest in the enactment creating this court, it is the purpose of providing a speedy hearing for both the importer and the Government, and an early determination of the questions arising in classification cases. The fact that the application for appeal shall contain a statement of the errors of law and fact complained of, and that the Board of General Appraisers is required to certify not only to the evidence taken by them, but also to the statement of facts involved in the case and their decision thereon, implies that the court is to determine the case which has previously been presented to the Board of General Appraisers and not a new case made up in this court.

It is true the power is given to remand the case for further proceedings by the Board of General Appraisers. But this authority is coupled with the authority to affirm, modify, or reverse, and this is the authority to affirm, modify, or reverse the decision by the Board of General Appraisers upon the case as made before them, and undoubtedly on such a hearing, if it should appear that the board has erroneously excluded testimony or committed any other error of law, the correction of which would involve of necessity a new trial of the case, the power to remand for this purpose would exist as it does in all cases in appellate courts, reviewing a case on writ of error.

It seems obvious that the intent of this act was to confer upon this court appellate jurisdiction only, and that that appellate jurisdiction partakes of the nature of an appeal in equity, and authorizes a determination of questions of fact involved. This we have indicated in *United States v. Reibe* (supra, p. 19, T. D. 30776). But such an appeal does not involve a trial de novo but a determination of the case upon the record made up by the Board of General Appraisers. The term "appeal" does not of necessity import a trial de novo. In *re Burnette* (73 Kansas, 609); 4 Enc. of Law and Practice, 15; 2 Cyc., 516.

It is urged that this court is by express language given jurisdiction to review as to the construction of law and facts, and that this provision necessarily includes the discretion to inform itself as to the facts through the process of remanding the case to the board with instructions to take further testimony and certify the case to this court, and that the general rules of practice with respect to appellate courts are not applicable in view of the express language of the organic act coupled with the intent to substitute the present statutory

procedure for the old, without in any way indicating an intent to curtail or limit the powers or authority of this court or to make them narrower than those with which the circuit courts had been invested.

We think the statute is not subject to this construction. If the contention were that this court might hear the case *de novo*, it would have greater force than does the contention here made, as it might be urged with some plausibility that the word "appeal" might import such an intent. As we have indicated, however, such seems not to be the ruling of the courts, but the practice of remanding a case to another tribunal to take testimony anew and to revise its holding has in the past been dependent upon express statutory authority, and is clearly not an incident of an appeal under any practice, ancient or modern.

It will not do to say that the practice which had formerly obtained is embodied in the organic act, for such a holding would ignore the fact that Congress in its wisdom has seen fit in the very act which creates this court to repeal the statutory authority for remanding a case to the Board of General Appraisers for the taking of new testimony and for a new finding of facts. This is most persuasive in determining what the intent of Congress was as indicated by the language employed in section 29.

It is established by the highest authority that the Congress may place such limitations upon the judicial power of a court, either of original jurisdiction or appellate jurisdiction in customs-revenue cases, as it may from time to time fix. As was said in *Nichols v. United States* (7 Wall., 126):

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute.

Again, in *Schillinger v. United States* (155 U. S., 166), the Supreme Court said:

The United States can not be sued in their own courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and the contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government.

Rule 11 of this court should be construed in connection with the statute giving authority to remand the case to the board by an order made on the final hearing before this court. If open to a broader interpretation it must be held that in so far as it attempted to extend the power of the court beyond the limit here prescribed, it was in excess of authority.

The motion to remand the case is *denied*.



McKESSON v. UNITED STATES (No. 117).<sup>1</sup>

## 1. CORRECTION OF THE RECORD.

When there was ample time to inspect the record as made up and to apply to the Board of Appraisers for any supposedly needed correction therein prior to its transmission to this court and there was a failure, without any good cause shown, so to apply, the appellant may not here question the truth of that record.

## 2. BINOXIDE OF BARIUM.

Binoxide of barium does not occur in a state of nature; it is not a clay or earth, wrought or unwrought; nor is it a mere mechanical mixture, but is an artificially produced chemical compound, differing essentially from the original material and was dutiable under paragraph 3, tariff act of 1897.

United States Court of Customs Appeals, January 25, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
Abstract 20183 (T. D. 29442).

[Affirmed.]

*Hatch & Chute* (Walter F. Welch of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Charles D. Lawrence on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

A quantity of binoxide of barium imported into the country at the port of New York was assessed by the collector of customs as a "chemical salt" at 25 per cent ad valorem under the provisions of paragraph 3 of the tariff act of 1897, which reads as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing and *all chemical compounds and salts* not specially provided for in this Act, twenty-five per centum ad valorem.

The importer protested that the importation was properly free of duty under paragraph 489 of the free list, which is as follows:

489. Baryta, carbonate of, or witherite,  
or that it was dutiable at either 75 cents or \$5.25 per ton under paragraph 44 thereof, which is as follows:

44. Baryta, sulphate of, or barytes, including barytes earth, unmanufactured, seventy-five cents per ton; manufactured, five dollars and twenty-five cents per ton,  
or that it was dutiable at either \$1 or \$2 per ton under paragraph 93 of the act, the relevant and material parts of which are as follows:

93. Clays or earths, unwrought or unmanufactured, not specially provided for in this Act, one dollar per ton; wrought or manufactured, not specially provided for in this Act, two dollars per ton; \* \* \*

or that it was subject to duty at 20 per cent ad valorem as a metallic mineral substance in a crude state under paragraph 183, which reads as follows:

183. Metallic mineral substances in a crude state, and metals unwrought, not specially provided for in this Act, twenty per centum ad valorem; monazite sand and thorite, six cents per pound.

<sup>1</sup> Reported in T. D. 31256 (20 Treas. Dec., 179).

The Board of General Appraisers sustained the collector, and the importers appealed to the United States Circuit Court for the Southern District of New York, which appeal was subsequently certified to this court for determination in accordance with the provisions of the tariff act of August 5, 1909. While the appeal was pending in the Circuit Court the appellants moved that the case be remanded to the board for correction of the record and testimony and the taking of further evidence on the issue of whether the importation was a chemical salt or compound, as found by the collector, or an earth wrought or manufactured, as claimed by the importers. The motion was denied by the Circuit Court and is renewed here.

The affidavits submitted in support of the motion do not positively assail the correctness of the record, and there is in them no positive or direct statement that the record does not truly and accurately reproduce the questions propounded to witnesses and the answers which they actually gave. The statement in the affidavit by appellants' attorney that he did not recollect propounding certain questions in the form stated in the transcript, and that a reference to carbonate of barium contained therein is unintelligible to himself and one of the witnesses, is hardly sufficiently positive or definite in form to justify a finding that the record does not set out the proceedings just as they occurred, especially as we must presume that the Board of General Appraisers certified to a correct record and performed the duty imposed upon it by law. But even if the affidavits were of a more positive and definite character, we should have some reserve in granting the relief requested. There was ample time to read the record after it had been made and to apply to the board for a correction thereof before it was forwarded. Having failed to do so, and no good cause appearing for not having done so, the appellants are not in a position to complain if at this late day they are not permitted to question its accuracy.

Appellants were aware of the nature and character of the testimony of the witness Gane as soon as it was given, and any application to permit him to modify, change, correct, or explain his testimony should have been made to the Board of General Appraisers either by direct motion or on motion for a rehearing before it lost jurisdiction by returning the record to the circuit court on appeal. No such application having been made to the board, this court would not be warranted in reopening the case to achieve an end which might have been accomplished had the appellants promptly and diligently availed themselves of a procedure adequate to the purpose.

*Motion denied.*

In passing it may be said, however, that even if the correction and change of testimony suggested were made they would not alter the decision which we have reached.

Binoxide of barium ( $\text{BaO}_2$ ) is evolved by artificial processes from natural substances of which barium is a constituent element, particularly from carbonate of barium ( $\text{BaCO}_3$ ), the chemical components of which are barium (Ba) and carbonic acid ( $\text{CO}_2$ ). The carbonate is an earthy deposit found in various parts of the world and is commonly known as witherite. To produce binoxide of barium ( $\text{BaO}_2$ ) the crude witherite ( $\text{BaCO}_3$ ), generally mixed with carbon, is exposed to a very high temperature. This decomposes the carbonic acid of the witherite into one atom of oxygen, which is taken up by the barium and carbonic dioxide ( $\text{CO}_2$ ), which is given off in the form of gas, leaving as the net result of the operation barium oxide or baryta ( $\text{BaO}$ ), a chemical union of barium and oxygen in the proportion of one atom of barium to one atom of oxygen. The barium oxide or baryta is then exposed at a temperature of  $450^\circ$  to a current of air free of carbonic acid and takes up an additional atom of oxygen, forming the product variously known as binoxide of barium, barium dioxide, and barium peroxide ( $\text{BaO}_2$ ), the article under discussion. Baryta ( $\text{BaO}$ ) and binoxide of barium ( $\text{BaO}_2$ ) are different substances, having different uses, and each of them is different from the natural substance, witherite, from which both of them may be developed by proper chemical manipulation.

So far as the evidence shows and an examination of scientific works discloses, the binoxide of barium does not occur in a state of nature. It is the result purely of artificial processes, and is one of the numerous creations of the chemical laboratory and of modern chemical science. It can not, therefore, be classed as a clay or earth wrought or unwrought, manufactured or unmanufactured, within the meaning of paragraph 93. That paragraph refers to certain natural substances, and to come within its provisions the clay or earth must continue to be a clay or earth. When the clay or earth is destroyed as the result of chemical decomposition and its freed chemical components form new chemical combinations, or remain free, the new substances so brought into existence are not and can not be classed as clays or earths. Witherite when burned at a high temperature ceases to be witherite and is resolved into two entirely new substances—oxide of barium, which remains in the crucible, and carbonic dioxide, which floats off as gas. Barium binoxide is a manufacture *from* clay or earth; it is not a clay or earth manufactured.

To say that it is a clay or earth because it was finally produced from such material is no more reasonable than to say that radium, one of the most notable achievements of chemical science, is pitchblende because it is made from pitchblende. Barium binoxide can not be classed as baryte or barytes earth for the reason that baryte or barytes earth is a sulphate of barium ( $\text{BaSO}_4$ ), another substance altogether and a natural product just as is witherite. That it is not

a metallic mineral substance in a crude state is evident, and indeed no claim that it is a metallic mineral substance is seriously urged by the appellants. Binocide of barium is not a mere mechanical mixture of barium and oxygen. Admittedly it is the product of a true chemical reaction artificially produced which first decomposes the original witherite and finally effects a chemical combination between barium and oxygen, in which combination the identity of both chemical elements as separate entities is entirely lost and from which is derived an entirely new substance differing radically from its components and the original material out of which it was created. Such a substance so evolved is clearly a chemical compound. It was therefore properly assessed for duty under paragraph 3 of the tariff act of 1897.

The decision of the Board of General Appraisers is *affirmed*.

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UNITED STATES *v.* MARSCHING (No. 124). UNITED STATES *v.* DRACKENFELD (No. 125). MARSCHING *v.* UNITED STATES (No. 168). DRACKENFELD *v.* UNITED STATES (No. 169).<sup>1</sup>

1. STATUTORY INTERPRETATION.

Any provision of a law must be read in the light of all the other provisions of that law, and in a tariff law the language used must be interpreted in view of the conditions of commerce existing when the statute was enacted.

2. *IBID.*

But where the essential words that support a construction contended for have been in a later enactment expressly omitted by the Congress, the omitted words may not be, by any rule or method of construction, restored in the terms of the law.

3. ENAMEL OR CERAMIC COLORS.

Enamel or ceramic colors containing no quicksilver were dutiable at 5 cents the pound, under paragraph 54, tariff act of 1897.

United States Court of Customs Appeals, January 25, 1911.

(Cross appeals from decisions of Board of United States General Appraisers (T. D. 30529).

[*Affirmed.*]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn* of counsel) for appellants and appellees in cross appeals.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This was an importation of ceramic or enamel colors used for decorating china ware and to impart a white glaze to glass. Assessment

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<sup>1</sup> Reported in T. D. 31257 (20 Treas. Dec., 182).

for dutiable purposes was made at the rate of 30 per cent ad valorem under paragraph 58 of the tariff act of 1897, which provides:

Par. 58. All paints, colors, pigments, lakes, crayons, smalts and frostings, whether crude or dry or mixed, or ground with water or oil or with solutions other than oil, not otherwise especially provided for in this Act, thirty per centum ad valorem; \* \* \*

The material contention of the importers, in the view of the court, is that paragraph 54 of that tariff act is the applicable one, which is as follows:

Par. 54. Vermilion red, and other colors containing quicksilver, dry or ground in oil or water, ten cents per pound; when not containing quicksilver but made of lead or containing lead, five cents per pound.

Paragraph 55 is also invoked, but in our view of the case consideration of its provisions is unnecessary.

The Board of General Appraisers reversed the decision of the collector and sustained the protest of the appellant upon the grounds that the portion of the merchandise that did not contain quicksilver was dutiable at 5 cents per pound under the last provision of paragraph 54.

Counsel for the Government seeks to controvert this conclusion and relies in support of that position, first, upon the asseveration that the last provision of paragraph 54, following the semicolon, applies only to "vermilion red," and that it is not predicated of the words "other colors" occurring in the portion of the paragraph preceding the semicolon. It is further contended by the Government that paragraph 54 relates only to such colors or vermilion red as either contains quicksilver or is practically and commercially susceptible of being made from quicksilver.

A quotation of the paragraphs in *pari materia* in previous tariff acts and the act of 1909 is instructive.

Act of 1890:

Par. 57. Vermilion red, and colors containing quicksilver, dry or ground in oil or water, twelve cents per pound.

Act of 1894:

Par. 45. Vermilion red, and other colors containing quicksilver, dry or ground in oil or water, twenty per centum ad valorem; vermilion red, not containing quicksilver but made of lead or containing lead, six cents per pound.

Act of 1897:

Par. 54. Vermilion red, and other colors containing quicksilver, dry or ground in oil or water, ten cents per pound; when not containing quicksilver but made of lead or containing lead, five cents per pound.

Act of 1909:

Par. 52. Vermilion reds, containing quicksilver, dry or ground in oil or water, ten cents per pound; when not containing quicksilver but made of lead or containing lead, four and seven-eighths cents per pound.

It will be noted that the act of 1890, paragraph 57, provided for "vermillion red, and colors containing quicksilver"; that the act of 1894, paragraph 45, while providing for "vermillion red, and other colors containing quicksilver" added a provision for "vermillion red, not containing quicksilver but made of lead or containing lead." The provision for merchandise not containing quicksilver was expressly predicated of "vermillion red" and naturally did not in terms extend to "other colors."

Congress, however, in the act of 1897 dropped the subject "vermillion red" from the second provision of the paragraph, and in the first part of the paragraph 54 of that act provided for "vermillion red *and other colors* containing quicksilver." After the semicolon no subject is expressly inserted, the language being: "when not containing quicksilver but made of lead or containing lead," and referring necessarily for the subject to the language of the provision preceding the semicolon.

The act of 1909, which is quoted only in so far as it may be instructive as to the legislative intent, omitted the words "other colors" before and retained the language after the semicolon of paragraph 54 of the act of 1897.

Counsel for the Government at the hearing sought to introduce testimony illustrative of the subject matter, with a view to supporting the construction of the law contended for by the Government. This testimony was ruled out by the Board of General Appraisers, and error is assigned for that cause. In our view of the case, if error were made by the Board of General Appraisers in sustaining objections to this testimony, it was immaterial error and should not, therefore, control the decision in the case.

The very able brief of counsel for the Government in this case seeking to supply in effect and to read into the statute in fact the very words omitted by Congress in the act of 1897 by construction emphasizes the omission by Congress of the essential words.

While it is true that every provision of law must be read in the light of all the other provisions of that law, and while it is true that the meaning of Congress, particularly in tariff legislation, must be ascertained in the light of the conditions of commerce, and that in this light the language used by Congress must be interpreted, or even in some cases supplied, we do not think that in a case like this where the essential words supporting the construction contended for have been expressly omitted by Congress, the courts can by any rule or method of construction read back into the act such words.

Manifestly reference for the subject of the second provision of the paragraph must be had to the first provision. There is no more reason for confining this reference to one of the subjects of the first provision

than the other. As there are several subjects in the provision the natural construction would be to refer to the last-mentioned subject in that provision which would be "other colors," whereas the contention is made that the reference for a subject must lead beyond these, excluding them, and attach to a previous subject. This does violence to the natural, logical, and grammatical construction of the paragraph. The fact that some inconsistency may be wrought by this holding, or that some inequalities of duties may be levied, or that some disturbance may be had in the remaining or other provisions, is not a sufficient warrant for the court to read back into the statute language expressly omitted therefrom by the Congress.

In the opinion of the court, the language of the act is plain and unambiguous. The rule is well settled that in the presence of such a provision the court should abstain from interfering with the will of Congress as expressed.

In *Reimer v. Schell* (4 Blatch., 328), approved in *Barber v. Schell* (107 U. S., 617), Nelson, circuit justice, said:

The legislature designates the articles by special description, as contradistinguished from a designation by a commercial name, and the proper inquiry as to their qualities and characteristics, with a view to ascertain if they come within the description. If they do, no argument can take them out of the rate of duty which has been imposed.

And again, it is stated of courts by the Supreme Court of the United States in *Bate Refrigerating Co. v. Sulzberger* (157 U. S., 1), and quoted at length in *United States v. Shing Shun & Co.* (173 Fed. Rep., 844), as follows:

Where the language employed in an act is clear and certain, they have nothing to do with the reasonableness or justice of the results flowing from according it its natural, usual, and obvious meaning, nor with any supposed policy actuating its framers.

And in *Scott v. Reid* (10 Peters, 524) the court said:

\* \* \* It is not for the court to say where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.

The principle was rather succinctly stated in *Coles v. Collector* (100 Fed. Rep., 442), wherein the court states:

To undertake a departure from the language used would in fact be an unjustifiable assumption by the court of legislative power. It is the duty of the court, where the language is free from doubt or uncertainty, to confine itself to the words of the legislative body that enacted the law, without adding anything thereto or subtracting anything therefrom.

In order for this court to approve the contention of the Government in this case it would be necessary, as stated, to read into the

statute words expressly omitted by Congress therefrom. We do not feel warranted in so doing, notwithstanding the persuasive force of the many rules of construction invoked by counsel for the Government. This conclusion disposes of the cross appeal in this case.

*Affirmed.*

LUNHAM v. UNITED STATES (No. 271).<sup>1</sup>

CERTIFICATE OF COLLECTOR AT PLACE OF EXPORTATION.

Where goods have been exported from one port of the United States and later are returned here for entry at another port, and when free entry of these goods as of domestic growth, produce, or manufacture is claimed, it is a reasonable exercise of the power vested in the Secretary of the Treasury for him to require a certificate showing the fact of original exportation; and it appearing the collector at the port of entry did not waive the production of such a certificate, and such a certificate not having been produced, an appeal will not lie against the collector's decision holding the goods dutiable.

United States Court of Customs Appeals, January 25, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6426 (T. D. 27576).

[Affirmed.]

*Walter Evans Hampton* for the appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation is tabasco sauce which was made in America, shipped from New Orleans to England in bottles. While there caps and printed labels of foreign make were attached to the bottles, and in that condition, with metallic sprinklers, which were in little boxes containing a gross in each box, designed to be attached to the bottles when their contents were used, was reimported to the United States and entered at the port of New York.

The goods were assessed for duty under paragraph 241 of the tariff act of July 24, 1897, and the sauce and bottles were claimed to be exempt from duty under paragraph 483 of the same act. The material portions of these respective paragraphs are as follows:

241. \* \* \* All vegetables, prepared or preserved, including pickles and sauces of all kinds, \* \* \*, forty per centum ad valorem.

483. Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process or manufacture or other means; \* \* \* but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury. \* \* \*

<sup>1</sup> Reported in T. D. 31258; see also T. D. 31409 (20 Treas. Dec., 186, 498).



The board sustained the collector upon the ground that the merchandise was advanced in value or improved in condition after having been exported and passed without deciding the Government's contention that the regulations of the Secretary of the Treasury made under the provisions of said paragraph 483 had not been complied with.

The importers appealed to the Circuit Court for the Southern District of New York, where further evidence was taken before a commissioner directed to the question of the compliance with such regulations. Before hearing in that court the cause was certified to this court for review.

The general regulations made by the Secretary of the Treasury under the provisions of paragraph 483 and in force at the time this merchandise was exported from New Orleans and reimported at New York, amongst other things, required in cases like the one at bar (see article 484 of the Customs Regulations of 1899) that—

If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, except in regard to exports to Canada by ferryboat, and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and the naval officer (Cat. No. 773), if any, of the port where the exportation was made, showing the fact of exportation from that port (and such certificate shall be furnished on application by the collector of customs at the port of exportation).

Authority was vested in the collector of the port of New York at the time of this reimportation to waive the certificate of exportation of the goods required in the above-quoted regulation when satisfied that the merchandise is of domestic origin, and when not satisfied he was directed to refer the matter to the Treasury Department. (See regulation embodied in Circular 35 of the Treasury Department, dated March 26, 1903, T. D. 24308.)

The record does not show that the collector at the port of New York exercised the authority so vested in him or that application to him so to do has been made by the appellants.

It is conceded that the appellants have failed to furnish the certificate from the collector of New Orleans, which is required by said general regulations, and the record clearly shows that such certificate has not been furnished by said collector because, as it is agreed, there is no record in his office which warrants the issue by him of such certificate. It being agreed that upon the outward manifest or other proper papers of the ship carrying this merchandise from New Orleans to England there was no statement showing that the merchandise in question was transported upon the vessel to England.

We are, however, satisfied from the record if the evidence therein contained is of the character that we may lawfully consider that

such merchandise was exported from New Orleans to England, as is claimed by the appellants. So far as we are able to learn from the record no mention of the shipment of these goods was made upon the outward manifest of the carrying ship because the then exporter failed to have it entered thereon, and such is the appellants' claim.

The first contention made by the Government is that the appeal must fail because the appellants have not brought themselves within the provisions of paragraph 483 of the act of 1897, so as to be entitled to the benefit of free entry as therein provided, because it is contended that the regulations made by the Secretary of the Treasury under the provisions of that paragraph have the force of law, which we are not at liberty to disregard.

Among others the following cases are cited: *Boske v. Comingore* (177 U. S., 459); *Ex parte Reed* (100 U. S., 13-22); *Smith v. Whitney* (116 U. S., 167-181); *United States v. Symonds* (120 U. S., 46-49, 50); *United States v. Dominici* (78 Fed. Rep., 334); *Eimer v. United States* (87 Fed. Rep., 202); *United States v. Brewer* (92 Fed. Rep., 341-342); *Borden v. United States* (132 Fed. Rep., 205, 206).

We are of opinion, and it is not otherwise claimed, that it is a reasonable exercise of the power vested in the Secretary of the Treasury to require that a certificate showing the exportation must be furnished when free entry is claimed, as in the circumstances of this case.

It is apparent that such a certificate would greatly aid in identifying the goods and establishing the fact of their previous exportation, and it should be noted that it is required only in cases where the ports of exportation and of importation are different.

We are unwilling in this case to disregard these regulations and permit the appellants to make proof of exportation other than in the manner prescribed by the Secretary of the Treasury. If it is done in one case, no good reason appears why it might not be done in others, and the purpose of the statute and the benefit to be derived from the reasonable regulations of the Secretary of the Treasury might thereby be destroyed.

It is claimed by the appellants that this is a case which calls for the application of the principle that the law never requires the performance of that which is impossible, and *Becks case*, found in G. A. 6212, and the case of the Central Vermont Railway Co., in G. A. 5219, are cited in support of the claim. It is sufficient to say that the circumstances in these cases are so different from those of the case at bar that we do not consider them an authority.

The result is that the decision of the board is *affirmed*.

UNITED STATES v. MANDEL (No. 297).<sup>1</sup>

## COTTON CLOTH WITH SILK SELVAGE.

Cotton cloth with selvage of silk, the selvage ordinary in kind and not designed to form a material and essential part of the goods as these might enter into consumption, was dutiable as cotton cloth under paragraph 306, tariff act of 1897.

United States Court of Customs Appeals, January 25, 1911.

TRANSFERRED from United States Circuit Court for Northern District of Illinois, Eastern Division, G. A. 6733 (T. D: 28815).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

*Comstock & Washburn* (*J. Stuart Tompkins* of counsel) for the appellee.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of Chicago classified certain dress goods as composed of cotton and silk, with cotton as the component material of chief value, and assessed them for duty at 8 cents per square yard and 30 per cent ad valorem under the provisions of paragraph 311 of the tariff act of 1897, which reads as follows:

311. Cloth, *composed of cotton or other vegetable fiber and silk*, whether known as silk-striped sleeve linings, silk stripes, or otherwise, of which cotton is the component material of chief value, eight cents per square yard and thirty per centum ad valorem: *Provided*, That no such cloth shall pay a less rate of duty than fifty per centum ad valorem. Cotton cloth, filled or coated, three cents per square yard and twenty per centum ad valorem.

The importers protested that the merchandise was cotton cloth within the meaning of paragraph 310, which reads as follows:

310. The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or otherwise, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practicable means. and that it was therefore dutiable under the provisions of paragraph 306, the material parts of which are as follows:

306. \* \* \* *Provided*, That on all cotton cloth exceeding one hundred and not exceeding one hundred and fifty threads to the square inch, counting the warp and filling, \* \* \* dyed, colored, stained, painted, or printed, valued at over twelve and one-half cents per square yard, there shall be levied, collected, and paid a duty of thirty-five per centum ad valorem.

The Board of General Appraisers sustained the protest and the Government appealed to the United States Circuit Court for the Northern District of Illinois, eastern division, which appeal has been certified to this court, in conformity with the tariff act of August 5, 1909, for determination.

<sup>1</sup> Reported in T. D. 31259 (20 Treas. Dec., 189).

The deputy appraiser and the Government analyst in the appraiser's office report that the *body* of the goods is of cotton and that the *selvages* are of silk. The decision of the Board of General Appraisers is to the same effect, with the exception that it finds that the selvages are composed of both silk and cotton. The cloth is 42½ inches wide, inclusive of the selvages, which are one-half inch wide. The only issue presented by the appeal is whether the merchandise is *cotton cloth* or *cloth composed of cotton and silk* within the meaning of paragraph 311 of the tariff act of 1897. The Government, relying on the fact that the selvege or part of it is of silk, contends that the fabric is composed of *cotton and silk*, and therefore dutiable as assessed by the collector. The importer, on the other hand, insists that as the body of the fabric is entirely of cotton, it should have been classified as a cotton cloth under "the countable provisions" of Schedule I of the act.

In general, the selvege of textile goods is a mere incident of their manufacture, and is not designed to give character to the fabric or to form a material or essential part of the woven article when utilized by the consumer. Its primary distinctive purpose is to prevent the distortion of the cloth and the raveling out or fraying of the weft. Sometimes it also conserves the object, especially in pile fabrics, of overcoming during weaving the tendency of the filling threads to draw the edges of the web unduly toward the center. When textiles are thrown into consumption the ordinary selvege has no use and when garments or other articles are made up from them it is either discarded entirely or concealed from view in a convenient seam. Of course a selvege might be made of such a width and such a design as to be an ornamental feature of the fabric or an essential, material, or substantial part of it *when used or made up*, in which case it would be something more than a selvege. That, is not this case, however.

The Board of General Appraisers finds that the mixture of silk in the selvege is for the purposes of a selvege, and an inspection of the goods discloses that the selvege itself gives no distinctive character to the cloth, has no value, and serves no useful end other than that of the ordinary selvege. Under the circumstances we would hardly be justified in holding that goods the *body* of which is *wholly of cotton*—goods which are evidently salable only as cottons—should be classified as *silk and cotton* fabrics by reason of a mere protection to the goods not designed to form a feature or a material, essential, or substantial part of them when put to actual use.

In no case cited by the Government was it held by the Board of General Appraisers or by the courts that the ordinary selvege was a factor to be considered in determining the true nature of the fabric—that is to say, the materials of which it is made. The cases of *Openheim* (T. D. 11580); *O'Neill & Quackenbush* (T. D. 12343); *Megros* (T. D. 12350); *Kaempfer* (T. D. 14696); *W. & J. Sloane* (T. D. 25384);

Vantine (T. D. 23470); Vantine, Abstract 3288 (T. D. 26041); Agop Aleon (T. D. 26187); Fritz & La Rue (T. D. 25878); Megros. v. United States (53 Fed. Rep., 244), and Fritz v. United States (135 Fed. Rep., 916) decided nothing more than that the selvaqe should pay the duty imposed on the rest of the fabric and that it should be weighed or measured with the goods of which it formed a part for the purpose of ascertaining the full amount of duty to be paid. They did not decide that the ordinary selvaqe is a factor to be considered in ascertaining whether a fabric is truly one of *silk and cotton* or one of *cotton* only.

The cases of Seeberger v. Farwell (139 U. S., 608) and Magone v. Luckemeyer (139 U. S., 612) held that where the *body* of the goods was composed of mixed materials they should be classified as goods of mixed materials. Neither of them referred to the selvaqe as an element or held that it should be considered in reaching a decision as to the proper classification of the merchandise. The case of the United States v. Altman (107 Fed. Rep., 15) decided that a corset edged with cotton lace was an article of wearing apparel made "wholly or in part of lace." In that case the trimming and ornamentation of the corsets with lace was a "significant feature of these goods contributing materially to their appearance, and doubtless to their salability and price." Whatever its quantity or value, the lace seems, therefore, to have been a material part of the corset and was designed and intended to continue in that relation to it when used by the consumer.

From the brief of appellant it appears that in Hammond v. United States (1 Estee's Hawaiian Repts., 344), it was held that rawhide shoes of which a small percentage of iron was a component part were articles composed "wholly or in part of iron." We have not been able to examine this case, but we think we are safe in inferring that the iron was a material part of the shoe, not a mere incident of its manufacture, and that either as an ornament or for some practical purpose the iron formed and was intended to form a part of the shoe when the latter was thrown into consumption. Rothschild v. United States (179 U. S., 463) held that the admission of a bale of tobacco containing 15 per cent of wrapper tobacco was open to criticism as violative of a statute in force which provided in clear and definite words that the effect of *mixing any portion of wrapper tobacco with a filler tobacco in an importation was to make the entire quantity dutiable as wrapper*. Evidently there is nothing in this case or in the other cases cited from which it can be deduced, either directly or on principle, that an ordinary selvaqe, having no use beyond that of a mere selvaqe and not designed or intended to be a feature of the goods, or to form a material, substantial, or essential part of them in actual consumption, should determine the classification of the whole fabric.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

MYERS *v.* UNITED STATES (No. 381).<sup>1</sup>

## FLOOR-PLANING MACHINES—TOOLS.

Floor planers, with an electric motor for the attached planes, resembling generally lawn mowers, but portable and when in use propelled by hand, are machine tools and were dutiable under paragraph 197, tariff act of 1909.

United States Court of Customs Appeals, January 25, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 7032 (T. D. 30666).

[Reversed.]

*Brown & Gerry* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

Paragraph 197 of the tariff act of 1909 fixes the duty on machine tools at 30 per cent ad valorem. Paragraph 199 fixes a duty of 45 per cent ad valorem on articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured. The importation involved in this case was assessed for duty under the latter paragraph, which is admittedly a correct classification unless the articles imported were machine tools.

The importation consisted of floor planers, resembling in general style lawn mowers, propelled by hand. In the body of each is a shaft upon which is a series of steel planing knives. To the planer an electric motor is attached, and by the electric power furnished the knives revolve with very great rapidity, and as the machine is propelled by hand the floor beneath the knives is planed in the manner that it would be by a carpenter using an ordinary jack plane.

A machine tool is sometimes technically said to "embrace the various machines used in the departments of engineers' works by turners, drillers, slotters, planers, boilermakers, etc., together with the various cutting, punching, and shearing tools attached to and forming a portion of the same." (Lockwood's Dictionary of Mechanical Engineering Terms, title "Machine tools.")

But it is very evident that the term "machine tool" has a much broader signification in common use. For instance, in the Century Dictionary a machine tool is defined as—

A machine driven by water, steam, or other power, for performing operations formerly accomplished by means of hand-tools, as planing, drilling, sawing, etc., and taking its special name from the kind of work performed, as planing-machine, drilling-machine, etc.

<sup>1</sup> Reported in T. D. 31260 (20 Treas. Dec., 192).

In the Standard Dictionary, under the title "machine tool," the definition is given:

A machine for doing work with cutting-tools, or one utilizing minor tools in performing the actual work, as a lathe, planing-, drilling-, rabbeting-, or tenoning-machine; \* \* \* opposed to hand-tool.

And under the title of "tool" appears the following:

A simple mechanism or implement, as a hammer, chisel, plane, spade, or file, used in working, moving, or transporting material. \* \* \* By extension, a machine, as a lathe or planer, employed in the making of machines.

If we apply the Century Dictionary definition of a machine tool, and treat the term as comprising a machine which accomplishes the work frequently accomplished by hand tools, and still further limit it to tools which are still controlled by hand, the articles in question here come within this narrower definition. If we turn to the title of "tools" in the Century Dictionary, we find the following definition:

A mechanical implement; any implement used by a craftsman or laborer at his work; any instrument employed for performing or facilitating mechanical operations by means of percussion, penetration, separation, abrasion, friction, etc., of the substance operated upon, for all of which operations various motions are required to be given either to the tool or to the work. Such machines as the lathe, planer, slotting-machines, and others employed in the manufacture of machinery are usually called machine tools.

The definition of "tools" given in Worcester's Dictionary is as follows:

Any instrument of manual operation; a mechanical instrument of any kind for working with; an implement commonly used by the hand of one man, in some manual labor.

The conclusion seems to be irresistible that the articles here under consideration are machine tools. They are implements used by the hand of one man, and are easily portable. It is just as essential to good workmanship that the tool be constantly attended by the operator, moved back and forth on the floor to be planed, by the hand of one man and given intelligent direction. The machine itself does not accomplish the result. The intervention of a single hand or workman is essential to its operation. The power and principle applied are the things that make it partake of the character of machinery. It still remains a tool within the definitions given by lexicographers.

Cases might be cited in which the word "tool" has been given a very much broader construction than is here employed. See cases collected in Words and Phrases Judicially Defined, volume 3, under the title "Tools."

We think, however, that within common understanding this implement is a tool to which power has been applied and comes within any proper definition of a machine tool. The holding of the board which sustained the classification made by the collector is *reversed*.

HUNT, Judge (specially concurring):

While I have been somewhat reluctant to agree with the conclusion reached, yet, after full discussion, I think it is probably a fairer interpretation of the statute than one which would regard the floor planer as a machine. The element of portability, too, is entitled to some weight as a circumstance in upholding the view that the planer is a machine tool, for, as commonly spoken of, one would regard a tool as a useful implement of manual operation easily moved and so to be distinguished from permanent fixtures, such as are found, for example, in the saws or planers which we find in sawmills with belts and stationary machinery. It is impossible to draw an exact line of demarcation between machine tools and machinery, but with the general rules stated in the opinion of the court I agree.

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AMERICAN SUGAR REFINING CO. v. UNITED STATES (No. 7).<sup>1</sup>

1. POLARISCOPE TEST OF SUGAR—FORCE OF TREASURY REGULATIONS.

The Treasury Department having promulgated detailed and comprehensive regulations respecting the use of the polariscope in testing sugar on importation, these regulations are to be taken not as instructions or orders to be followed at discretion, but on the contrary have the force of law, are uniform in their operation, general in application to all importations of sugar, binding alike on importers and on the officials of the Treasury.

2. INVALID CONTRACT.

By a familiar rule where one party to an alleged agreement has concealed from the other facts it was the duty of the first party in fairness to disclose, the contract so entered into is not a valid one.

United States Court of Customs Appeals, February 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 30130).

[Reversed.]

*H. B. Closson* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The appellants made the following importations of sugar at the port of New York, upon which duty should be assessed under the provisions of the tariff act of 1897: By the ship *Strathdon*, March 20, 1898, 23,700 packages; by the *Arecuna*, September 20, 1898, 8,847 packages, and by the *Asphodel*, January 23, 1899, 101,626 packages.

At the time of these importations paragraph 209 of said tariff act provided that such sugars should be tested by the polariscope and that

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<sup>1</sup> Reported in T. D. 31273 (20 Treas. Dec., 222).



the results of such polariscopic tests should determine the classification of the sugars upon which duty at the rates provided in the act should be assessed.

At the same time there were in force regulations, promulgated by the Secretary of the Treasury on the 27th day of October, 1897, under the authority of section 251 of Revised Statutes, which contained detailed provisions for the application of the polariscopic test to such sugars. It is unnecessary to recite these regulations at length. They may be found at page 974 et seq. of the Treasury Decisions for the year 1897, and are in T. D. 18508. Amongst other things, they provide that suitable samples shall be taken of each importation designed to fairly represent the same; that at least two tests shall be made of each sample, and that the test to be accepted for classifying the sugars shall be the average of such tests or of such tests and additional tests, if made, as the regulations provide. It is prescribed that all tests under the regulations shall be made by Government employees, and, further, that the importers shall be immediately notified by messenger, when practicable, of the results of the tests first made to determine the classification, and that he shall have two official days in which to claim error in the reported tests and to ask for a resampling and retesting, for which provisions are also made.

Detailed provisions are made in the regulations for the location, equipment, and maintenance of laboratories in which sugars are to be tested and minute instructions given for the making of these polariscopic tests. The regulations in terms provide that they shall apply to all sugars imported under the provisions of the act of 1897.

It is also expressly stated—

That these regulations shall take the place of all orders or regulations heretofore issued with reference to the sampling and classification of imported sugars and molasses.

Samples of each importation were taken and the tests made pursuant to the regulations. Portions of some or all of these cargoes were resampled or retested, but it is unnecessary to consider the details thereof. These tests gave results which were unsatisfactory to the customs officials, and instead of using the official tests as the basis of classifying these sugars the collector classified all the same upon what is known as the settlement tests.

From the record before us, as well as information obtained from the opinions in the cases hereinafter referred to in which an adjudication of some of the issues raised by the appellants' protests has already been made, we learn that the polariscope is an instrument so adjusted that when a ray of polarized light passes through a tube filled with a certain solution of sugar the scale indicates the percentage of pure sugar; that under the commercial system of testing sugars which had been in use prior to the passage of the act of 1897 the actual readings

of the scale on the eyepiece of the polariscope were taken as showing the actual value of the sugar; that is, the result of the polariscopic test was determined by the readings of the eye. This commercial method was in use between buyers and sellers of sugars, each party employing experts to test the sugars, and in case their tests disagreed a compromise of the same was arrived at by averaging the results of the polariscopic tests made by the representatives of the respective parties or by making a third test. This method was known as the settlement test, and the words "settlement test" will be hereinafter used in that sense.

The method prescribed in the Treasury regulations before referred to varies from the settlement test in the main by prescribing that certain changes or reductions in the readings of the polariscope must be made to correct erroneous results which follow from the polariscopic tests of sugars taken at differing temperatures, it being established that the same sugars when tested at different temperatures by the polariscope show different results. The courts in the cases involving these protests hereinafter referred to appear to have been satisfied that the methods adopted by the Government result is more accurate determination of the amount of pure sugar in each sample tested than the "settlement test."

The appellants seasonably filed their protests against the classifications and assessments so made, in each protest alleging in substance, amongst other things, that under the law the Secretary of the Treasury had no authority to insist upon the tests provided for by the general regulations referred to as a test of sugars, but that the only lawful test was the usual commercial polariscopic test recognized and accepted in trade by buyer and seller as ascertained by methods and instruments used by chemists engaged in the business of testing sugars, being methods in general use by sugar chemists, manufacturers, and refiners at the time of the existing tariff act, and claiming that the tests and returns were erroneous and excessive owing to erroneous and incorrect methods of testing the sugars by the polariscope as prescribed by the regulations of the Secretary of the Treasury.

Upon this phase of the protests appeal was taken by the appellants here from the judgment of the Board of General Appraisers overruling the same to the Circuit Court and then by the United States to the Circuit Court of Appeals, in which last-mentioned court the judgment of the board was affirmed. A petition to the Supreme Court for a writ of certiorari in the case was later denied.

The issue which was determined in this litigation appears to have been as stated by the Circuit Court of Appeals—

Whether Congress used the words "testing by the polariscope" and "shown by the polariscopic test" with some special trade meaning which would confine them to a particular method of conducting such test.

The court held that the words were not so used and that all the matters of detail relating to the polariscopic tests came naturally within the province of the Secretary of the Treasury under the general power given him to make regulations not inconsistent with law under section 25 1of the Revised Statutes, and concluded by saying that—

It seems a reasonable conclusion that Congress when it passed the act of 1897 containing merely the phrase "testing by the polariscope" without any further directions as to such test, without approval or condemnation of either of the variant methods of conducting it which the Treasury Department had theretofore prescribed for imported as well as domestic sugars intended to leave all details as to selection of instruments, employment of experts and instruction as to the method, to the sound discretion of the Secretary.

And for the purposes of this case we conclude that such decision is an adjudication that the regulations in question are a proper exercise of the powers conferred by statute upon the Secretary of the Treasury.

Reference for the history of this litigation is here made to *Bartram Bros. v. United States* (123 Fed. Rep., 327); *United States v. Bartram Bros.* (131 Fed. Rep., 833); *McCahan Sugar Refining Co. v. Steamship Wildcroft, etc.* (195 U. S., 635), and *American Sugar Refining Co. v. United States* (211 U. S., 155).

The case before this court is upon further claims embodied in the original protests and not considered in previous litigation.

For convenience we insert here the protest in the case of the *Are-cuna*, which is typical of the protests upon this phase of the case with reference to the three shipments:

That the tests upon which said sugar is classified are not the tests of the samples or the resamples taken by the appraisers, and are not the tests contemplated by the law or directed by the regulations of the Treasury Department.

The same considerations apply to the three protests, and they are disposed of in the same manner except as may be hereinafter stated with reference to the importation upon the *Strathdon*, concerning which it is claimed by the Government there was a valid and express agreement on the part of the appellants that the settlement tests should be used as the basis of classifying the same.

The appellants contend that the official Treasury Regulations of 1897, which prescribe the methods to be adopted in making polariscopic tests have the force of statutory law and that the collector was bound to obey the same; that, therefore, the classification of the sugars upon the settlement tests was illegal and that the Treasury Department was without authority so far as this case is concerned to authorize the collector by special instructions embodied in the department's letter under date of November 3, 1898, hereinafter referred to, to classify the sugars upon any basis other than the official tests which were made pursuant to the regulations.

The counsel for the Government concedes that a regulation of an executive department when authorized by law has the force of a statutory enactment, but contends that the said regulations of the Treasury Department are not of that character, but that they are, rather, rules and directions to the subordinate officials of that department designed as a guide not only to collectors but other officers in testing and classifying sugars, and are not, on the whole, of a character that prevents the Secretary from varying or disregarding them in any particular case or in this case. The Government further contends that upon the record it appears that the appellants are gainers from the adoption of the settlement tests, because it claims a less amount of duty on the whole of these importations was paid than would have been paid had the official tests been accepted as the basis of classifying these sugars.

For convenience in discussion, we dispose of the second claim first by saying that we do not understand that the facts relating thereto are as claimed by the Government. There is no evidence which tends to support the same except a statement in a letter from the assistant appraiser to his superior under date of March 31, 1899, relating wholly to the importation of the *Asphodel*. In this letter he states that in his opinion the appellants were the gainers by the adoption of the settlement tests as a basis of classification to the amount of over \$2,000 as far as that cargo was concerned. We do not think this statement is competent evidence of the fact, and, in addition, are unable to understand how in view of the contents of the letter he could himself come to that conclusion. Whether we are right in this understanding or not is immaterial, because there is nothing in the record from which it may be claimed that the duty exacted was not greater on the other cargoes than it would have been had the official tests been taken as the basis of their classifications.

The only express authority shown for the collector to classify these sugars upon the basis of the settlement tests may be found in a letter from the Assistant Secretary of the Treasury under date of November 3, 1898, in which this language is used:

In the case of the importations ex *Arecuna*, referred to, the so-called settlement tests should be returned by you on the invoices as the tests of the importations covered thereby, and that when such importers refuse to comply with your request for such settlement tests you should exercise the authority conferred upon you by the provisions of paragraph 16 of the act of June 10, 1890.

The record in places refers to the fact that special instructions presumably of like tenor were given by the Treasury Department with reference to the other importations, but they were not produced in evidence.

The paragraph of the act of June 10, 1890, referred to in the above letter, provides in substance that the appraisers and collectors may cite any importer to appear before them and to testify under oath as to

any matter or thing deemed material respecting any imported merchandise for the purpose of ascertaining the dutiable value or classification thereof, and that such appraisers or collectors in such proceeding may require the production of any letters, accounts, or invoices relating to said merchandise, and from the record we understand it was contemplated by the Treasury Department to invoke the provisions of this section, if necessary, for the purpose of compelling the importers to produce, amongst other things, their settlement tests, and that the same were furnished by the importers by reason thereof.

The record appears to disclose that the examiner having the *Arecuna* importation in charge thought the original tests were not fairly representative of the shipment. Just why he came to that conclusion the record does not state, but we assume that it resulted from discrepancies in the official tests or from the fact that the results of such tests and the settlement tests were considerably at variance.

As we have seen, under the commercial system which had been in use for 20 years before the passage of the act of 1897 the actual readings of the scale on the eyepiece of the polariscope were taken as showing the actual value of the sugar—that is, the test was one made by the readings of the eye. In the case of a disagreement in the tests between the parties interested a settlement was reached either by other tests or by equalization of those already made.

Under the later Treasury method the test is not absolutely determined by the eye, but the regulations provide that the readings must be corrected in the manner there provided, and, as we understand, these changes or corrections were directed to be made because of the fact that the same sugars when tested at different temperatures showed different results.

We are, therefore, brought to the consideration of the real question in issue, which is: Are the Treasury regulations referred to such general regulations made by the Secretary of the Treasury under the authority of law as to have the force of law? As before stated, the adjudication already had in this case goes no further than to say that such regulations are warranted by law. It is material, therefore, to consider in a general way, a little further than has already been done, their scope and effect. They relate to all sugars imported under the tariff act of 1897 and dutiable thereunder, and consequently relate to all importers of such sugars. Although they are directed to the customs officials, they were published in the authorized Treasury Department publications, thereby becoming matters of public knowledge, and, we think, of such character that importers were bound to take notice thereof. They prescribe precisely and with great detail how imported sugars shall be tested. No provisions are found therein for the acceptance of any other than the official tests for the purpose of classifying sugars. At least two, and in certain cases more than

that number, of separate tests of the sugars are provided for, all to be made by the Government's experts; and the regulations further provide, if upon notice of the results of the tests the importer claims error therein and seasonably requests a resampling of the sugars, such resampling and retesting thereof may be granted, provided that "on evidence furnished such claim shall appear to the appraiser to be well founded."

Upon the subject of classification these regulations contain over 30 separately enumerated paragraphs, and conclude with the one already cited, to the effect that the regulations shall take the place of all orders and regulations heretofore issued with reference to the sampling and classification of sugars.

What would be the natural inference of any person of intelligence upon reading these regulations? Would it be that the tests therein prescribed were to govern in all cases or that they should be adopted only if and whenever the results thereof were satisfactory to the department itself? Do they contain fair notice to the reader that at the option of the department the result of its own tests may be disregarded and other tests substituted therefor as the basis of classification and the resulting assessment of duties? Of course, if by a fair interpretation they may be held to be rules designed only for the guidance of collectors and other officers, and of such a character that the Treasury Department may at any time abrogate or change the same, they may be disregarded, as was done in this case.

We think upon a careful examination of these regulations that it must be held that they are general as applying to all sugars and general as applying to all importers, and that they convey fair notice to the importers that all sugars subject to duty will be classified as a result of the tests made by the experts in the collector's office appointed for the purpose, and that no tests for classification will be accepted by the department other than such official tests.

We do not think after the tests had been made by the department and the classification made as a result thereof that an importer could be heard to claim that other and private tests should be used in classifying the sugars. The converse should be true, and he should have a right to understand that the sugars would be classified as the result of the official tests and not otherwise.

We are strengthened in this conclusion because of the fact that the regulations so fully provide for mistakes and accidents in the testing of the sugars, and show in no uncertain language that the classification for duty must be made upon the result of the official tests either the original or the original and resampling tests, as the case may be. In the case of a resampling it is provided that the appraiser may classify the sugars upon the test either of the original or the resample -- seems to him most just. We can not escape the conclusion that

these regulations in name are regulations in fact and not merely instructions or orders.

It was held by the Court of Claims in the case of *Landram v. United States* (16 C. Cls. Rpts., 74, 86) that—

A distinction between “instructions” and “regulation” is inherent in the nature of the two things and that an instruction is a direction to govern the conduct of a particular officer to whom it is addressed and that a regulation affects a class of officers.

Applying that definition here, it seems that the regulations of the Secretary of the Treasury in question are clearly general regulations in that they affect classes of persons—namely, importers of sugars and officers whose duty it is to classify the same—and that they also affect a class of importations—namely, sugars.

It is to be observed that there is no evidence upon the record tending to show any fraud or misrepresentations with reference to these importations upon the part of the appellants. The samples for testing were taken by the Government as provided in the regulations, and no claim of fraud is made in this court.

We think, on the whole, that these regulations for the classification of sugars, which, as we have already seen, have been adjudicated as a proper exercise of the authority of the Treasury, are general regulations having the force of law, and must govern the classification of the sugars involved in this case, and that it was not competent for the Secretary of the Treasury to vary the same, as was attempted by the special directions contained in the letter of November 3, 1898.

The record is entirely silent as to when, where, by whom, under what circumstances, or with what degree of accuracy these settlement tests were made; but it is reasonable to presume that they were made either at the port of exportation or of importation during the time, whatever it was, and as to that the record does not show, covered by the transaction of sale and purchase and that they were made by the agents of the appellants and their vendors.

The contention of the Government that its prescribed tests are more accurate than the settlement tests, which was upheld in the other branch of this case, and the fact that so much care has been taken in prescribing these regulations for the testing of sugars, to the end that accurate results shall be obtained, all lead to the conclusion that in this case the official tests more nearly represent the true quality of the sugars for classification purposes than the settlement tests; but whether this be so or not we see no reason for holding that, at their option alone, the officers connected with the collection of the customs duties shall be permitted to go contrary to the general regulations they have themselves prescribed. To hold otherwise, we think, would have a tendency to produce great confusion and uncertainty in the classification of sugars, because, if not limited to its own tests, the Government may accept or compel the acceptance of any private tests,

settlement or otherwise. If it is found that the prescribed regulations are not adequate to protect either the Government or the importers, it would seem that the same power still resides in the Secretary of the Treasury to make general regulations for the protection of both that was vested in him when the regulations in question were promulgated.

As to the *Strathdon* importation, it appears that the examiner at the port of New York was dissatisfied with the results of the official polariscopic tests thereof, and so reported to his superiors; that thereupon and on the 28th day of October, 1898, the supervising examiner sent to the appellants a notice in effect that a resample and retest of the *Strathdon* cargo had been made which showed a much higher grade of sugar than any test the Government had in fact made.

We are not clear whether or not a resampling test had been made, but are clear that if it had been made the results thereof were not correctly stated in such notice.

An authorized representative of the appellants then had a conference with the examiner having this matter in charge. At the examiner's request the settlement test of the shipment was then given to him, and thereupon he said:

I guess I will classify this sugar on this settlement test; if you are satisfied, we will be satisfied.

The representative of the appellants replied:

Yes, rather than take the tests just sent to me;

referring to the alleged resample test.

And it is upon this agreement that the Government relies in support of its claim that the *Strathdon* importation was lawfully classified upon the basis of the settlement test.

It is apparent that the representative of the appellants at the time was given to understand that the alleged resample tests had in fact been made; that they showed a much higher grade of sugars than the original tests made by the Government, and that the examiner was disposed to insist upon the same as a basis of grading the sugars unless the settlements tests were agreed to. It is also apparent that the examiner then knew, or ought to have known, either that the resample tests had not been made of the *Strathdon* cargo or that the results thereof had not been correctly reported to the appellants.

We think, under these circumstances, the representative of the Government was either making misrepresentations relating to a material fact or was concealing something which was known to him, and which was not known to the other party, and which it was his duty at the time to impart to the representative of the appellants. It follows that an agreement so obtained can not and ought not to be enforced. The principles of law applicable to such a state of facts



are too familiar to require discussion or citation of authorities. One will not be permitted to take advantage of an agreement so obtained.

We note this conclusion is reached upon the evidence of the appellants' representative, and that, although no reason appears why he could not have been called as a witness, the examiner who procured this agreement did not testify.

It may be further observed that in due course the appellants protested, as already appears, to the classification of the sugars of this importation upon the basis of the settlement tests.

The Government does not claim that any agreement of similar import as to the cargoes of the *Arecuna* or the *Asphodel* was in fact made, except it urges that the court should presume the existence of an agreement, as to these two cargoes, like the one relating to the *Strathdon*. Our conclusion as to the *Strathdon* case, however, disposes of any such claim as to the cargoes of the *Arecuna* and the *Asphodel*.

We hold that the sugars in all these importations should be classified for duty upon the basis of the official polariscopic tests already made; that reliquidation should be made accordingly, and therefore the judgment of the circuit court and the board is *reversed*.

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VITELLI v. UNITED STATES (No. 145). ROSSANO v. UNITED STATES (No. 146). AFELTRA v. UNITED STATES (No. 147).<sup>1</sup>

CANNED TOMATOES AND ARTICHOKEs.

Vegetables that have been packed in tin cans and subjected to heat to expel the air, then hermetically sealed and again heated for the purpose of sterilization, are not vegetables in the natural state, but are prepared vegetables, and were dutiable under paragraph 241, tariff act of 1897.—United States v. Strohmeyer (167 Fed. Rep., 533) distinguished.

United States Court of Customs Appeals, February 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21572 (T. D. 29906).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The importations involved in these three protests are canned tomatoes and artichokes from Italy and entered at the port of New York in 1908. They were assessed for duty under paragraph 241 of the tariff act of 1897, the material part of which is as follows:

241. \* \* \* All vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per centum ad valorem.

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<sup>1</sup> Reported in T. D. 31274 (20 Treas. Dec., 231).

The appellants claim the same are dutiable under paragraph 257 of the same act, which reads as follows:

257. Vegetables in their natural state, not specially provided for in this act, twenty-five per centum ad valorem.

Evidence was offered before the board by the importers to sustain the protests, and was met by that of the Government to support the legality of the collector's classification and assessment.

The material part of the opinion of the board by General Appraiser Waite was as follows:

\* \* \* The testimony taken, it is agreed, shall apply to the various protests herein enumerated. Very little testimony seems to have been given directly upon the treatment of the artichokes. However, samples of the artichokes, the peeled tomatoes, and those that are unpeeled, have been introduced in evidence. The question turns upon the amount of manipulation or preparation which has been given to the products. A fair preponderance of the evidence, we think, shows this treatment to have been, first, a washing of the vegetables, and in the case of the peeled tomatoes, a short immersing in hot water to facilitate the removal of the skins; after which they are placed in cans, subjected to heat to expel the air, then hermetically sealed and subjected to further heat for the purpose of sterilizing. The amount of heat and the treatment in canning the tomatoes and the artichokes appear to have been the same. An inspection of the goods imported reveals the fact that they are cooked. This inspection, together with the evidence in the case, satisfies us that they are prepared for the table, unless, perchance, it may be necessary to heat them and add seasoning. We think they are far removed from vegetables in their natural state, and to hold otherwise would be to render practically inoperative the paragraph providing for prepared vegetables.

The contention of the appellants here is that the vegetables are not prepared or preserved, but are in their natural state, and they rely principally upon the case of *United States v. Strohmeyer & Arpe Co.* (167 Fed. Rep., 533) to sustain their claim. In that case, as appears by the opinion, cauliflower had been trimmed, washed, and packed in weak brine for preservation during transportation, and the Circuit Court of Appeals held that such treatment did not bring the commodity within the meaning of paragraph 241 as a prepared or preserved vegetable.

In the case at bar the board has found that the tomatoes, after having been washed, in some cases being peeled and in others not, were placed in tin cans, subjected to heat to expel the air, then hermetically sealed and further heated for the purpose of sterilizing; that the amount of heat and the treatment in canning the tomatoes and artichokes appears to have been the same; that an inspection of the goods imported reveals the fact that they were cooked and that they were prepared for table use, unless it is necessary to heat and add seasoning.

The oral evidence upon which these findings are reached is conflicting, but an examination thereof satisfies us that by a fair preponderance it supports the findings of the board.

It appears that by hermetically sealing the tin cans and sterilizing the contents preserves them until the cans are opened for use, and, in addition, the commodities are partially if not wholly prepared for table use except the addition of the necessary seasoning.

Instead of being subject to decay, as would be the case if the importations were in their natural state, they are indefinitely preserved as the result of the treatment to which they have been subjected, and this preservation is not limited to the time required for transportation. We do not think that vegetables in this condition are in their natural state within the fair meaning of paragraph 257, but, as the board concluded, they are far removed from that condition. The result is that the judgment of the board is *affirmed*.

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GODILLOT v. UNITED STATES (No. 185). REISS v. UNITED STATES (No. 186).<sup>1</sup>

MARASCHINO CHERRIES.

There is an acknowledged difficulty in determining the precise percentage of alcohol that is necessary to constitute a preservative of cherries in maraschino, when these are packed in hermetically sealed bottles or tins; but where alcohol in amounts from 3.10 per cent to 5.45 per cent appears to have been used, and the evidence showing that alcohol in such proportions retards fermentation when the fruit is exposed to air, it is held this amount serves a purpose in preserving the fruit for use; the fruit was so preserved in spirits and was dutiable under paragraph 263, tariff act of 1897.—United States v. Reiss (166 Fed. Rep., 746) distinguished.

United States Court of Customs Appeals, February 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6958 (T. D. 30222).

[Affirmed.]

*Comstock & Washburn* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in these cases consisted of cherries in maraschino put up in a light sirup or in sugar containing various percentages of alcohol, and packed in hermetically sealed bottles or tins. The percentage of alcohol varies in the different importations from 3.10 per cent in one instance to 5.45 per cent in another, one sample containing 3.60 per cent and one 4.50 per cent.

The rate assessed by the collector was 1 cent per pound and 35 per cent ad valorem under paragraph 263 of the tariff act of 1897. The protestant claims that the importation should be assessed under paragraph 262 as fruits "prepared in any manner, not specially provided for in this act," at 2 cents per pound.

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<sup>1</sup> Reported in T. D. 31275 (20 Treas. Dec., 233).

Paragraph 263 reads as follows:

Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum of alcohol and not specially provided for in this act, thirty-five per centum ad valorem and in addition two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum. \* \* \*

The question of what constitutes fruits preserved in spirits has been before the courts in two cases at least. The first case arose under the tariff act of 1894. Paragraph 218 of that act, which corresponds to paragraph 263 of the act of 1897, omitted the word "spirits," so that fruits preserved in spirits were not within its provisions. The case was *Reiss & Brady v. United States* (135 Fed. Rep., 248), and it appeared from the testimony of expert witnesses that the importations contained quantities of alcohol varying from 6.48 per cent to 8.57 per cent. There was also testimony by the importer that it contained 10 to 15 degrees of alcohol. It appeared that this alcohol could not have been produced by fermentation. The court said:

The tariff act of August 27, 1894, contains no provision for fruits preserved in spirits. A specific duty, however, is placed upon fruits preserved in sirup or sugar or in their juices. \* \* \*

The omission of the words "or spirits" in paragraph 218 of the act of August 27, 1894, left the articles unprovided for, except, as already stated, under the general terms of section 3 of the act.

This case was on appeal affirmed by the court of appeals on the opinion of the circuit judge.

The words "or spirits" having been reincorporated into the act of 1897, the question again arose in *United States v. Reiss & Brady* (166 Fed. Rep., 746), in which case, as the record shows, the cherries were put up in hermetically sealed bottles, and the opinion states:

The sirup contains an insignificant quantity of alcohol and no juice. The evidence shows that the sealing and not the sirup is the preservative.

A reference to the record of the *Reiss & Brady* case shows that the analyses there discovered alcohol in the different samples varying from 0.70 per cent to 1.20 per cent. This, as indicated by the opinion, was treated as an insignificant quantity.

In the present brief the importers' counsel state that they have not appealed in any case where the percentage of alcohol exceeded 6 per cent. It is difficult to assign any reason why this per cent should be given as the dividing line. It is to be noted that the paragraph quoted (263), by very plain implication, makes dutiable fruits preserved in spirits in which a less percentage than 10 per cent of alcohol is present. This might perhaps properly have been treated as the

dividing line and is so treated by paragraph 274 of the present tariff act of August 5, 1909, which contains the following:

\* \* \* comfits, sweetmeats, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto, or preserved or packed in molasses, spirits, or their own juices, if containing no alcohol, or containing not over ten per centum of alcohol, one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum of alcohol and not specially provided for in this section, thirty-five per centum ad valorem and in addition two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum. \* \* \*

We are bound to construe paragraph 263 of the tariff act of 1897 as evidencing a purpose to impose a tariff upon fruits preserved in spirits containing less than 10 per cent of alcohol. This being so, and it appearing that in order to preserve fruits indefinitely without being sealed it should contain from 14 to 16 per cent of alcohol, it becomes our duty to ascertain what is meant by the term "preserved" as used in the section. The evidence in this case clearly shows that a much less percentage would retard fermentation when exposed to the air, and that this would be true of a percentage as low as 3 per cent. It is significant that in the trial of a former case a witness, a member of the firm of Reiss & Brady, testified that in the year 1906 they directed their goods to be put up with 5 per cent of alcohol, and further testified as follows:

Q. What is that alcohol put in there for?—A. That is put in because they found lately we find it is necessary, because they are used mostly for bar purposes, and the barkeeper opens it and he has been kicking that the goods spoil too quick.

Q. What is the function discharged by this alcohol, intended to be subserved by it, in putting it in? Is it to preserve the article?—A. Preserve the article? No. It is after it gets open it will preserve it better, but not as far as preserving itself is concerned.

Q. What is the purpose of putting the alcohol in the cherries at all?—A. When it gets open, after the bottle has been opened, the fruit will keep in better condition when containing this amount of alcohol than it will without.

\* \* \* \* \*

Q. Would 5 per cent operate now to preserve them?—A. After the bottle has been opened?

Q. After the bottle has been opened.—A. It seems so.

It can not be said therefore of alcohol present to the extent of 5 per cent of the importation that it is an insignificant quantity. It answers a purpose, and a material purpose, in preserving the fruits for a sufficient length of time to enable the purchaser to make use of them, which would not be true if the alcohol were not present.

It is most difficult to undertake to draw a dividing line based upon the percentage of alcohol present. We think, however, that in the present case there was a sufficient quantity of alcohol in all these

importations to serve a purpose in preserving the fruit so that after being opened the fruit could be used in the ordinary course without fermentation. It served a purpose, therefore, of preserving the fruit, and the fruit was preserved, in that sense at least, in spirits.

The decision of the Board of General Appraisers in each of these cases is *affirmed*.

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FRANKLIN SUGAR REFINING CO. v. UNITED STATES (No. 282).<sup>1</sup>

COMPUTING A COUNTERVAILING DUTY.

Under the tariff act of 1897 the Secretary of the Treasury possessed full authority to assess and collect duties imposed by law to countervail foreign-paid bounties, and his determination, as of the date of the importation itself, of the amount of bounty granted on an exportation of raw beet sugar from Germany and imported here is not open to collateral attack and is final.—*Cramer v. Arthur* (102 U. S., 612) cited and approved.

United States Court of Customs Appeals, February 1, 1911.

APPEAL from the decision of the United States Circuit Court, Eastern Division of Pennsylvania (T. D. 27309).

[Affirmed.]

*John G. Johnson* and *James Wilson Bayard* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

In the months of June, July, and August, 1898, the appellant imported from the Empire of Germany large quantities of raw beet sugars, which were duly entered at the port of Philadelphia. Final liquidation was not had, however, until June 27, 1899, on one importation, and at various dates in the month of January, 1901. Protests were filed against these liquidations within the time allowed by law. The sole question presented by these protests is whether the countervailing duty laid upon these importations was in excess of the export bounty under the laws of the Empire of Germany.

It is conceded that the sugars were under the law of Germany entitled to an export bounty; but it is contended that the determination of the Secretary of the Treasury and of the collector that the amount of such bounty was 2.50 marks per 100 kilos was erroneous, and, further, that inasmuch as subsequent to the importation in question, and prior to the final liquidation, a new ascertainment and determination of the provisions of the German law was made by the Secretary and the net amount of the bounty allowed by Germany was declared to be 2.40 marks per 100 kilos, the liquidation should have been on this basis.

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<sup>1</sup> Reported in T. D. 31276 (20 Treas. Dec., 236).

The authority conferred upon the Secretary of the Treasury is found in the act imposing a duty. Section 5 of the tariff act of 1897, so far as it is material, reads as follows:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Acting under the authority conferred by the latter portion of this section, the Assistant Secretary of the Treasury, on the 31st of July, made a tentative determination or declaration of the rate of bounty paid under the German law. On the 22d of September, 1897, a further determination was made by the Assistant Secretary, acting under the authority of the statute, and after quoting the statute the determination proceeds as follows:

In pursuance of these provisions, the following amounts of bounties respectively paid, on the exportation of sugars, by the countries hereinafter named, are hereby declared for the assessment of additional duties on sugars imported from, or the product of, such countries or their dependencies, viz: \* \* \* Germany. 1. On raw sugar at least 90 per cent polarization and on refined sugar under 98 per cent and at least 90 per cent, 2.50 marks per 100 kilos.

On the 12th of December, 1898, the Secretary of the Treasury again issued a like order determining that the bounty paid by Germany was 2.50 marks per 100 kilos.

On the 20th of June, 1899, the Treasury Department issued a circular in which the Secretary declared and determined the bounty paid by Germany to be 2.40 marks per 100 kilos.

The questions presented are, first, whether the rate as determined and in force at the time of the importation should govern, or whether, on the other hand, the determination at the date of the final liquidation should be adopted; second, whether it is competent to show by independent testimony, or by the fact of a later determination coupled with testimony showing that the law in force in Germany at the time of the first determination had not been changed, that the rate of 2.40 marks per 100 kilos was in fact the correct rate, and that therefore the orders of July, 1897, and September, 1897, should be disregarded.

We think the language of section 5 of the act of 1897 makes it very clear that the additional duty shall be levied and paid upon the importation of the article. The obligation then arising to pay the tax on the importation, the fact that this final payment in liquidation of liability is postponed, does not affect that liability. The really important question is whether the determination when made by the Secretary of the Treasury, or by the Assistant Secretary who is authorized to act for him, is controlling, or whether that determination may be impeached collaterally.

The precise question has only arisen in the present case and in a later case, decided on the 10th of March, 1910, in which the present appellant was a party, and which is found reported in 178 Fed. Rep., 747. But a similar question has arisen under the law providing that the value of foreign coins in the currency of this country shall be ascertained and declared periodically by the Secretary of the Treasury. The question has been before the courts in numerous cases as to whether this proclamation of the Secretary of the Treasury was conclusive, and uniformly it has been held that such was its effect.

In *Cramer v. Arthur* (102 U. S., 612), in dealing with that question, it was said:

That valuation, so long as it remained unchanged, was binding on the collector and on importers—just as binding as if it had been in a permanent statute, like the statute of 1846, for example. Parties can not be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol or by financial quotations in gazettes, that its valuations are inaccurate. The Government gets at the truth, as near as it can, and proclaims it. Importers and collectors must abide by the rule as proclaimed. It would be a constant source of confusion and uncertainty if every importer could, on every invoice, raise the question of the value of foreign moneys and coins. \* \* \*

\* \* \* \* \*

The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations. From the letter of the Secretary exhibited in this case, we infer that this was afterwards done, and that he made the desired change. But this change in the regulations does not affect prior transactions which took place before they went into effect. These transactions must be governed by the regulations in force at the time. It is of the utmost consequence to the Government, and it is, on the whole, most beneficial to importers, that the value of foreign moneys should be officially ascertained, and that they should be by a uniform method or rule.



We think this language is peculiarly appropriate to the subject of this litigation. Congress might have left it open in each case for proof to be offered and for the collector in each case to determine what the actual bounty paid by the country of origin was; but Congress saw fit in its wisdom to provide that there should be uniformity in all ports of entry in the country, and as to all importers, and therefore that the amount of bounty paid upon exportations of sugar should be ascertained and declared by the collector of customs. Manifestly this would be of little value if it could be controverted on every importation. Uniformity would not be obtained under such circumstances, nor would a subsequent modification of the determination by the Secretary of the Treasury work out uniformity if it were permitted to be applied in one case and not in all. The statute itself contemplates that there may be changes in the foreign law, or that further information may lead to a modification of the orders, as it is directed that the Secretary of the Treasury shall from time to time ascertain, determine, and declare the net amount of such bounties, and make the needful regulations, etc. See also *United States v. Klingenberg* (153 U. S., 93) and *Hadden v. Merritt* (115 U. S., 25).

Fixing the value of foreign coin is not the only instance in which the final determination of questions under the tariff law is left to the Secretary of the Treasury. See the cases of *Ferry v. United States* (85 Fed. Rep., 550), *Buttfield v. Stranahan* (192 U. S., 470), and *United States v. American Express Co.* (177 Fed. Rep., 735).

It is urged, however, that the authority to fix the value of foreign coins is a different power from that exercised in this case. It is said:

A coin is a concrete thing, the composition and the value of the component parts of which can only be determined by delicate chemical analysis and most accurate and careful weighing. They are physical facts which can only be ascertained by experts and as to which there are no effective means of verifying different ascertainment. Obviously, therefore, some standard ascertainment by some expert must be adopted; and such result is attained through the statutes referred to by the court below. \* \* \* In the present case, on the other hand, the matter for determination is the meaning of a written instrument—a statute of a foreign country.

We think, however, that the reason upon which the cases rest involves the proposition that the delegation of this power to the Secretary of the Treasury is as much for the purpose of securing uniformity throughout the various ports of entry of the country and to advise the importer of the exact amount of the countervailing duty at the time of the importation as it is to reach the correct result. As is indicated by the quotation from the case of *Cramer v. Arthur* (*supra*), the delegation of this power was for the purpose of avoiding confusion and uncertainty and to reach a result which should be final and conclusive.

The Board of General Appraisers and the Circuit Court having reached a conclusion in harmony with what we have stated above, the decision will be *affirmed*.

UNITED STATES *v.* SALOMON (No. 307).<sup>1</sup>

## 1. LANGUAGE IN COMMERCIAL USAGE.

Language will be presumed to be used in commerce as in ordinary life and to establish that a term is used in commerce with a signification differing from that of the same term when ordinarily employed, its use in commerce must be shown to be general, uniform, and definite.

## 2. COTTON LINTERS.

Short bits of lint that adhere to the seed of cotton in the ordinary process of ginning and are later stripped from the seed by a specially constructed gin, becoming then what are commonly known as "linters," are not waste, but cotton, and under paragraph 548, tariff act of 1909, are free of duty; and this, irrespective of a cleansing process to which the linters may have been subjected before importation.

United States Court of Customs Appeals, February 1, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 7050 (T. D. 30728).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

*B. A. Levett* for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

This is an appeal by the United States from a decision of the Board of General Appraisers at New York sustaining a protest by the importers, appellees, against the assessment made by the collector upon certain merchandise imported at New York.

The appraiser, in his report, held the merchandise to be cotton waste, which had been treated, bleached, and prepared for use in the manufacture of paper. Duty was assessed at the rate of 20 per cent ad valorem, under that provision of paragraph 313 of the tariff act of 1909, which reads as follows:

313. \* \* \* Cotton waste and flocks, manufactured or otherwise advanced in value, twenty per centum ad valorem.

The importers claimed that the merchandise was free of duty under paragraph 548 of the tariff act of 1909, which reads as follows:

548. Cotton, and cotton waste or flocks.

The finding of the Board of General Appraisers was, substantially, that the article was cotton, and therefore free of duty.

The substance of the evidence of the importers is that the merchandise in question is made from what are called linters, a short-fiber cotton taken from the cotton machine; that the linters are boiled with a mixture of hot water and soda ash to loosen the dirt; that afterwards

<sup>1</sup> Reported in T. D. 31277 (20 Treas. Dec., 240).

chloride of lime is added to kill whatever dirt is left; that then the stock is washed in pure water, left to dry, put into bales, and shipped to this country; that the article is used principally for the manufacture of smokeless powder by the United States Navy and Army; that formerly cotton waste was sometimes used to produce the article, but that it was found unsuitable, as it contained hard stock, short waste cotton, short waste, which would not nitrate, and that nitration has to be absolutely perfect in order to produce an absolutely smokeless powder or guncotton; that the article never has been waste; that in the process of producing linters cotton is packed in the regular way, brought to the cotton gin, where the gin takes off the cotton as much as possible from the seed, but can not take it off entirely; that then this cotton seed is taken to a cottonseed-oil mill and before they get any oil out of the cotton seed they take certain fibrous material off the seed, and that which is taken off is called linters; that such a product is not a waste product, but is a short fiber cotton; that the linters have a certain commercial value, sold principally for smokeless powder purposes; that before the cotton seed is crushed they try to remove all the cotton; that the seed-crushing manufacturers have linters machines for the purpose of treating the seed; that there is hardly a trace of lime or soda left in the fiber at the proving grounds, but that this is removed by washing with pure water; that the treatment is very simple, in that it consists of putting the seed in a bath of chloride of lime, taking it out, putting it in a washer where water runs through it for some time, and then putting the stock to dry before baling; that the cotton comes over cleaned; and that it is used also for the manufacture of artificial leather, and for the purpose of making leather; that the cotton is American; that there are many different kinds of cotton waste, the chief use of cotton waste being for cleaning purposes, spinning, and packing; that there are so-called sweepings, cotton-waste sweepings, which, after cleaning, can be used for smokeless powder manufacture.

It appeared that Salomon Bros. & Co. had sold the article as cotton waste, to be used for manufacturing pyro guncotton for the manufacture of smokeless powder; that after procuring it the powder manufacturers clean it of dust by a beating process; that afterwards it is put through a picking machine and then put into a drying apparatus for taking the moisture out of it; that the picking machine has a shaft on which there are teeth revolving at high speed, which take the cotton as it passes through it and fluffs it up, loosens it apart so that it may readily accept the heat in the drying apparatus to take the moisture out. One of the witnesses said that he was familiar with linters and that quantities of it were used in manufacturing powder;

that linters, or the lint, is the cotton that is taken off the seed that has been through the ginning process.

Another witness testified that prior to 1897 merchandise like the exhibit in the case was known as cotton bleached or bleached cotton waste; that it was sold only to manufacturers of smokeless powder.

Patrick E. Hayes, a witness called by the Government, testified that he was an assistant superintendent of a manufacturing concern which made wadding and battings and dealt in cotton waste and the products of cotton; that he was familiar with cotton waste; and that prior to 1897 "cotton" meant "the product of the cotton field baled up in the various grades in which it is quoted in the daily exchanges, running from strict low ordinary up to strict good middling grades—that is, cotton from the lowest to the highest;" that the article in question would not come under the term "cotton;" that cotton waste prior to 1897 was the waste product from the cotton mills—"any kind of waste made from cotton in any way, and sometimes waste from waste where mills run waste and any sort of materials;" that the term "cotton waste" had a definite, uniform, and general understanding in the trade prior to 1897 which conformed to the answers just given; that in his business all sorts of waste material are offered to his firm; that some manufacturers bleach their cotton and then they run it, making a bleached waste; that there are dyed wastes, where the cotton is dyed before it is manipulated. Witness said he had never dealt in smokeless powder cotton prior to 1897; that he had not bought anything quite as short fiber as the merchandise in question, but that he had bought belached waste "of that general color, etc.," generally for use in their mill.

Henry C. Lovis, a manufacturing chemist, explained how the article was produced, saying that the cotton fiber as taken from the bale is put through machinery for the purpose of removing the dirt, seed, and extraneous matter—anything but cotton fiber; that it then went through a process of boiling with alkalies, was then treated with bleaching chemicals, usually chloride of lime, and then treated with acids and intermediate washings and dried; that the article could be produced from cotton fibers or cotton waste. Witness defined linters as the fiber that comes from the cotton seed. It is the fiber not taken out in the very first process in the cotton gin, but is part of the same fiber that comes off in the cotton gin, but it is generally the shorter hair that remains on the cotton seed.

Another chemist called by the Government testified that he had made a chemical examination of the article and determined that the cotton had been treated in a way to eliminate the natural oil of the cotton, which he saw was shown by the fact that the fiber is absorbent; that if dropped on water it would sink, whereas ordinary cotton

or cotton as it comes from the fields, as known commercially, would float; that there was 0.6 of 1 per cent of ash in the exhibit shown.

George E. Moore, who is in the cotton business, testified for the Government that he had never dealt in such an article as herein involved, and had never known such an article to be bought or sold as cotton.

Counsel for the Government base their argument against the decision of the board upon the ground that the merchandise consists of a highly purified form of cotton produced from linters or linters waste. They say that the record shows that cotton linters is a form of waste and that the imported merchandise is cotton waste advanced in value by an elaborate purifying or manufacturing process, hence that the decision of the board is erroneous.

We find ourselves unable to agree with this contention. We can not find that "cotton" and "cotton waste," as the words are used in the sections of the tariff act quoted, are employed in a denominative sense. Commercial classification is commonly used in considering "short staple," "medium," "extra," "middling," and other grades of cotton, but the very meager testimony in the record to the effect that "cotton" and "cotton waste" have a definite commercial nomenclature falls far short of that measure of evidence required to establish commercial designation. No words of limitation surround the words, and we can not infer that as used in trade they have a meaning different from that which is popular; wherefore the rule that the language of a tariff act is presumed to have the same meaning in commerce that it has in ordinary use becomes applicable and controlling.

In *Swan v. Arthur* (103 U. S., 597), the Supreme Court said that:

\* \* \* While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown. \* \* \*

And, again, it is laid down that as necessarily commercial designation is a result of established usage in commerce and trade, such usage to effect a general enactment must be definite, uniform, and general, and not partial, local, or personal. This doctrine was well invoked by the Board of General Appraisers in the matter of the protests of *Salomon Bros. & Co.*, reported in T. D. 27289. General Appraiser De Vries there considered the meaning of the words cotton and cotton waste or flocks, as used under the provision of paragraph 537 of the tariff act of 1897, and the words manufacture of cotton, as used in paragraph 322 of the same tariff act. In reaching the conclusion that Congress did not intend the words cotton and cotton waste as used in the aforesaid paragraph 537 to be limited in their scope to any trade

understanding, assuming that one such already existed, Judge De Vries said:

The words "cotton" and "cotton waste" as used in paragraph 537 are surrounded by no statutory indications that they are used in a commercial sense. In fact, they are surrounded by no limiting language. No word could be more comprehensive in use, no word could be surrounded by fewer limiting words, than the word "cotton" as used in paragraph 537, or "cotton waste" standing, as they do, by themselves. Both of these terms as used include every possible variety of cotton and every possible variety of cotton waste. Thus, in *Schoellkopf v. United States* (71 Fed. Rep., 694) the question was the scope of the paragraph of the free list, "671. Paraffin." The Circuit Court of Appeals for the Second Circuit said:

"The counsel for the Government contends that the word 'paraffin' in the free list refers only to the hard or waxy substance, but the evidence does not support this contention. *There is no question of commercial designation*, for the name of the article has no peculiar meaning when used in trade different from its popular meaning. \* \* \* *The use by Congress of the single word 'paraffin' without any qualification manifests an intention to cover at least all varieties of the article which were known when the act was passed.*"

See also *United States v. Wells, Fargo & Co.*, decided by this court, and reported in *supra*, page 158, T. D. 31211.

Turning now to the article under consideration, it is of common knowledge that the process of separating cotton seed from the lint cotton has been vastly improved since the invention of the cotton gin, the old-fashioned ginnery and screw having long since given way to the battery ginnery with its numerous saw gins, while the condenser and automatic press have superseded the wooden screw. And not the least among the successive improvements have been delinting machines, wherein many saws are set closely together and with finer teeth than those in the ginning machine, the purpose being to constitute a mechanical arrangement whereby the short fiber or linters are successfully removed from the cotton seeds.

What are called linters by the current of recognized works on cotton and cotton seed, are short bits of lint that adhere to the seed of the cotton in the ordinary process of ginning, and are stripped by a specially constructed gin. This description of linters would clearly put them within the definition of cotton, or the soft, downy vegetable fiber surrounding the cotton seed, and so be applied to them as part of the cotton as much as to the longer fibers removed in the first ginning process.

The idea that "linters" is a waste seems to us to be inexact. It is not a refuse from the cotton first ginned, but a part of the original fiber about the seed not separated by the first ginning machine, but obtained by a reginning in a machine of somewhat similar mechanism. Waste ordinarily implies superfluous, useless, or rejected material, something left over, as the refuse of cotton manufacture. Let it not be understood that we mean to hold that Congress has used

the word waste in the tariff act as meaning that which has no value—worthless remnants—but that waste is something which is, generally speaking, left over in the treatment of the material, once obtained, as contradistinguished from the treatment to obtain the material itself. In *Standard Varnish Works v. United States* (59 Fed. Rep., 456), the court said:

\* \* \* Congress evidently did not use the word as meaning “that which is of no value; worthless remnant; refuse,”—the primary definition given in Webster’s Dictionary,—since it imposed upon it an *ad valorem* duty. The Century Dictionary defines “waste” as “broken, spoiled, useless, or superfluous material; stuff that is left over, or that is unfitted, or can not readily be utilized for the purpose for which it was intended; overplus; useless or rejected material.” This definition exactly fits spoiled, superfluous, or rejected material, which is of the same kind as the material utilized for the intended purpose. \* \* \*

The court there cited with approval the ruling In *re Higgins* (55 Fed. Rep., 278), where it was said that “garnetted waste is the product of a garnett machine, which tears and ravel out the twist in thread, thus reducing it back to the original purified wool by reason of taking out the twist which is originally given to the wool to make it yarn or thread,” and held that it was plain that the waste was still wool. And in speaking of waste rope and waste bagging, provided for in paragraph 670 of the tariff act of 1890, it was argued that although such waste was unfitted for the purpose for which the bagging or rope was intended, the waste was no new creation, but was the same substance as the bagging or the rope which was used for the intended purpose.

To conclude the brief discussion that we have entered upon, we will say that cotton waste means that superfluous article or stuff remaining after some treatment of cotton—that is, cotton waste presupposes cotton which has been obtained, used, or treated in a way to make or leave a superfluous or refuse article. But it does not seem to us that the fine fibers which surround the capsules should be regarded as a cotton waste, merely because the seed to which such fiber clings has to be given a second treatment in a machine which was not so perfect as to separate such finer fibers in the first treatment. Or we might put it in this way: Clinging to the cotton seed there are fibers of several kinds. Those of the one kind may be easily separated by one process of ginning; those of another kind by another process of ginning; but the product obtained by the processes is none the less cotton, and nothing else. And as the material is cotton, the fact that it is cleansed and dried before importation is immaterial to the issues of this case.

It follows that the Board of Appraisers was right, and their decision must be sustained.

*Affirmed.*

ROBINS v. UNITED STATES (No. 339).<sup>1</sup>

## 1. BELTINGS.

"Beltings" as used in paragraph 320, tariff act of 1897, denotes beltings as articles of dress.

## 2. BALATA BELTINGS.

Without determining balata to be india rubber in the commercial sense, balata is in similitude, india rubber, and was dutiable under paragraph 449, tariff act of 1897.

United States Court of Customs Appeals, February 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29727).

[Affirmed.]

*Comstock & Washburn* (J. Stuart Tompkins of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case comes to us on an appeal taken from the decision of the Board of General Appraisers to the United States Circuit Court for the Southern District of New York, transferred to this court under the provisions of the act of August 5, 1909.

The merchandise in question is balata belting, composed of balata and cotton, balata being the component material of chief value. The merchandise was assessed at 30 per cent ad valorem under the provisions of paragraph 449 of the tariff act of 1897 providing for "manufactures of \* \* \* india rubber \* \* \* or of which (india rubber) is the component material of chief value, not specially provided for."

The protest claimed the merchandise to be dutiable at 20 per cent ad valorem under section 6 of the act as nonenumerated articles manufactured in whole or in part, or under section 7, at the same rate of duty, by similitude to band or belting leather, provided for in paragraph 438.

The Government's contention is that the merchandise is either assessable under paragraph 449 as assessed by the collector, or that it should be assessed under paragraph 320 as belting. Paragraph 320 occurs in schedule I, under the title of "Cotton manufactures," and the section itself reads in part as follows:

Bandings, beltings, bindings, bone casings, cords, garters, lining for bicycle tires, ribbons, suspenders and braces, tapes, tubing, and webs or webbing, any of the foregoing articles made of cotton or other vegetable fiber; whether composed in part of india-rubber or otherwise, and not embroidered by hand or machinery, forty-five per centum ad valorem; \* \* \*

<sup>1</sup> Reported in T. D. 31278 (20 Treas. Dec., 246).



We think the connection in which the word "beltings" here appears is indicative of a purpose to restrict it to beltings used as articles of dress, and is not intended to apply to machinery beltings. This is the view taken by the Board of General Appraisers in the matter of the protest of the New York Leather Belting Co. (T. D. 28298), where this precise question was considered, and where it was held that under the doctrine of *ejusdem generis* belting of the character herein involved was excluded from classification under the provisions of paragraph 320. We agree with this conclusion.

It was held in the case of *Earle Bros. v. United States* (153 Fed. Rep., 773), that balata, while differing in species from india rubber, falls within the commercial understanding of india rubber. We find it unnecessary to affirm this holding, as we think the same result as to this case should be reached without determining that question.

It is beyond question that balata is in its material and substance similar to india rubber. There is a slight difference between the elasticity of india rubber and balata. India rubber is more elastic, while balata is somewhat tougher. But it is used for similar purposes, and possesses the characteristics of india rubber in all essentials. It has some elasticity, it is very similar to india rubber in appearance, and is adapted to substantially the same uses.

It is argued that the similtude clause does not apply and the case of *Morgenstern & Goldsmith v. United States* (T. D. 26733) is invoked to sustain this contention. That case, a decision of the Board of General Appraisers, arose under paragraph 449 of the tariff act, which reads as follows:

Manufactures of bone, chip, grass, horn, \* \* \* or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem. \* \* \*

The importation consisted of umbrella handles made of an artificial substance called gallilith, and it was contended that the article was dutiable by similitude as manufactures of horn because of the similarity of use. It was said in the opinion:

Since there is no dispute that the umbrella handles in question are made of gallilith, the idea that they resemble horn in either material, quality, or texture may be dismissed from further consideration. So that, therefore, if the merchandise is dutiable at all by similitude it is simply because of the use to which in the form imported it is applied. \* \* \*

It is in evidence, and in fact it may be said to be within common knowledge, that horn is manufactured into many articles other than umbrella handles. If, therefore, the merchandise in question—concededly made of a substance other than horn, but which in form and use is similar to umbrella handles made of horn—falls within the blanket provision for manufactures of horn in said paragraph 449, it would follow that numberless other articles made from probably as many substances into as many forms, not enumerated in the tariff act, would be dutiable by similitude as the merchandise in question was assessed, and we hardly think that such is the law or that Congress so intended.

Plainly, we do not think that the provision in the tariff act for manufactures of horn is such an enumeration as warrants the application of the similitude clause to an imported article, not provided for, *manufactured of a substance altogether different from horn in material, quality, and texture.*

Umbrella handles similar in form, and of course for the same use, are made also of wood, celluloid, mother-of-pearl, and metal, all of which materials are provided for in the same general way as manufactures of horn, and such being the fact the question naturally arises, why apply the similitude clause in the assessment of duty at the rate for manufactures of horn in preference to the rates provided for manufactures of these other materials? Such an application of the similitude clause as has been made in this case seems to us to be altogether unjustified.

It requires but a reading of this decision to point the difference between the question there presented and the one here under consideration. The similitude in this case is not a similitude of use, but it is a similitude of material, quality, and texture. In all these respects balata is so similar to india rubber as to have been classed as india rubber in judicial determination, and it needs no argument to show that it is in fact almost identical with india rubber in all essential respects. The designation or classification of an article as a manufacture of a particular specified material is obviously a sufficiently specific designation for tariff purposes. *Arthur v. Sussfeld* (96 U. S., 128); *Arthur v. Butterfield* (125 U. S., 70); and *Hartranft v. Meyer* (135 U. S., 237).

Any article manufactured from such a material is an article enumerated within the meaning of the similitude clause of section 7 of the tariff act of 1897. Balata, therefore, bearing this similitude to india rubber, we think is dutiable under paragraph 449 unless there is some other paragraph more specifically describing it. That the similitude clause is to be invoked before resort is had to the clause fixing the tariff on nonenumerated articles is elementary, and similitude in any one of the particulars named in section 7 is sufficient.

It is, however, urged that this importation is more properly dutiable under paragraph 438, which, under the title of "Leather and manufactures thereof," fixes a duty of 20 per cent ad valorem on band or belting leather. As already pointed out, the similitude to india rubber is most apparent. Even if we assumed that there was a like similitude to band or belting leather, the very terms of section 7, that "if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty," would determine this case.

We conclude that the Board of General Appraisers was not in error in classifying this importation under paragraph 449, and the decision of the board is *affirmed*.

UNITED STATES *v.* BORGFELDT (No. 398).<sup>1</sup>

## DEER-FOOT HANDLED KNIVES.

A 6-inch knife, with a 5-inch folding blade that when opened fastens with a spring lock, blade and handle measuring 10 inches in length, is a "hunting knife" in the commercial sense of the term, and was dutiable under paragraph 155, tariff act of 1897.

United States Court of Customs Appeals, February 1, 1911.

TRANSFERRED from United States Circuit Court, Eastern District of Pennsylvania,  
G. A. 6703 (T. D. 28685).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

*Curie, Smith & Maxwell* (*Thomas M. Lane* of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The articles imported in this case were entered at the port of New York and are dutiable under the tariff act of 1897, either as clasp knives, under paragraph 153, or as hunting knives, under paragraph 155, of the act. The material part of the respective paragraphs is as follows:

153. Penknives or pocketknives, clasp knives, pruning knives, and budding knives of all kinds, or parts thereof, and erasers or manicure knives, \* \* \* wholly or partly manufactured \* \* \* valued at more than three dollars per dozen, twenty cents per piece and forty per centum ad valorem.

155. Table, butchers', carving, cooks', hunting, kitchen, bread, butter, vegetable, fruit, cheese, plumbers', painters', palette, artists', and shoe knives, forks and steels, finished or unfinished, \* \* \* : *Provided*, That none of the above-named articles pay a less rate of duty than forty-five per centum ad valorem.

The importation is knives with deer-foot handles. The entire length of the official sample is about 6 inches, the blade being a 5-inch folding blade which, on being opened, fastens with a spring lock, and when open the blade and handle measure about 10 inches in length.

The collector classified the articles as clasp knives. The appellees claimed, and the board held, that they were dutiable under paragraph 155 as hunting knives.

The board, amongst other things, found that the term "hunting knives" is a well known commercial term, and includes the knives in question, and also that the term "clasp knives" is not, as a trade term, in general use.

It is clear that, although they are not so designated in trade, these knives are in fact clasp knives because the blade folds into the handle,

<sup>1</sup> Reported in T. D. 31279 (20 Treas. Dec., 249).

so that the real question is whether the importation shall be classified according to the ordinary meaning of the words or according to the commercial designation.

But preliminary to its consideration the Government contends that the evidence fails to establish a commercial designation and asks us to reverse the finding of the board upon that question. The commercial designation of an article is not a matter of which courts can take judicial notice, but is to be proved by evidence. *Seeberger v. Schlesinger* (152 U. S., 581).

From the discussion of the testimony in the briefs and from the record it is clear that there was considerable conflict in the evidence upon this point, and we are unwilling to say that this finding of the board is either without substantial evidence to support it or that it is clearly contrary to the weight of evidence, one of which conditions should obtain to warrant a reversal of the finding. On the other hand, without going into a discussion thereof, we think the finding is sustained by a fair balance of the evidence, having in mind that the presumption is in favor of the collector's action. The real question, therefore, recurs whether or not the knives shall be classified according to their commercial designation. This question was long ago answered by the Supreme Court in the affirmative.

In *Two Hundred Chests of Tea, Smith, Claimant* (22 U. S., 428, at p. 437), the following language was used:

The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless to attempt any other classification than that derived from the actual business of human life.

And again in *Cadwalader v. Zeh* (151 U. S., 171, at p. 176) the court declared—

It has long been a settled rule of interpretation of the statutes imposing duties on imports that if words used therein to designate particular kinds or classes of goods have a well-known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved that the common meaning of the words is to be adopted.

Applying the doctrine of these cases to the one at bar, the judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES v. MYERS (No. 45).<sup>1</sup>

## 1. UNMANUFACTURED OR ROUGH-TRIMMED MICA.

The evidence being in conflict as to the actual commercial designation of a large part of the mica of this importation, and the Board of Appraisers having found these consignments to be unmanufactured or rough-trimmed mica, and not mica cut or trimmed in definite shapes or sizes, this finding of the board will be adhered to.

## 2. IBID.

And this the more readily on a consideration of what had been, subsequent to the enactment of the tariff act of 1897, the established practice under the law in classifying mica at ports of entry; and further, in view of the fact that after attention drawn, the Congress retained in the tariff act of 1909 the precise language of the former statute that had been so construed.

## 3. MICA SPLITTINGS.

Splittings of mica are not manufactures, but are rough-trimmed mica.

## 4. DUTIABLE.

The importations of mica were dutiable, as unmanufactured or rough trimmed, under section 91, tariff act of 1909.

United States Court of Customs Appeals, February 8, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 6989 (T. D. 30421.)

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

*J. F. Zoller* (*M. F. Westover*, special counsel) for appellees.

Before HUNT, SMITH, and BARBER, Judges.

HUNT, Judge, delivered the opinion of the court:

This is an appeal by the United States from a decision of the Board of General Appraisers sustaining certain protests of the importers against the assessments of duty made by the collectors upon merchandise imported at the port of Plattsburg, N. Y., through Rouse Point, N. Y., and at the port of Albany, N. Y.

The merchandise imported through the port of Rouse Point consisted of 1,576 pounds of knife-trimmed mica from Canada, invoiced as "rough (knife) trimmed," and 28,512 pounds of thin-split mica, also from Canada, invoiced as "rough knife-trimmed and split." The merchandise imported through the port of Albany, N. Y., consisted of 4,305 pounds of sickle-trimmed mica, and 42,370 pounds of thin-split mica, from London and Calcutta, all invoiced as "Mica."

The collectors at both ports classified the mica as "cut or trimmed" or manufactured, requiring the payment of duty at the rate of 10 cents per pound and 20 per cent ad valorem, instead of at the rate of 5 cents per pound and 20 per cent ad valorem, the rate prescribed by the United States tariff law of 1909, for mica unmanufactured or rough-trimmed only.

<sup>1</sup> Reported in T. D. 31301 (20 Treas. Dec., 284).

As the decision of the case necessarily involves a construction of paragraph 91 of the tariff act of August 5, 1909, we quote the section:

91. Mica, unmanufactured, or rough trimmed only, five cents per pound and twenty per centum ad valorem; mica, cut or trimmed, mica plates or built-up mica, and all manufactures of mica or of which mica is the component material of chief value, ten cents per pound and twenty per centum ad valorem.

The most important contention of the Government's counsel is that it was error in the board to find that the merchandise was mica unmanufactured or rough trimmed only, because the evidence shows that the merchandise is mica cut or trimmed. It is also urged that part of the merchandise—the so-called mica “splittings”—should have been classified as manufactures of mica, and that what is referred to as trimmed mica by some of the witnesses should have been regarded as dutiable as “trimmed” mica under paragraph 91 of the tariff act of 1909.

For the purpose of showing the character of the merchandise covered by the importations involved, and as explanatory of the meaning of the terms “rough trimmed” and “cut” or “trimmed,” used in the tariff act of 1909, heretofore quoted, the importers called a number of witnesses, each one of whom stated that he had had experience in the mining and manufacture of mica, and several of whom proved that they were familiar with the meaning of commercial terms relating to mica as used in the purchase and sale of such merchandise.

Frank C. Lord said that he was general foreman in the General Electric Works at Pittsfield, Mass., in charge of the mica used for flatirons; that an exhibit, numbered 2, invoiced as “rough knife-trimmed” mica, imported from Canada, was known in the trade as “rough trimmed” mica, and that after receiving such mica it had to be split to about three to four one-thousandths of an inch before it was blanked out to the proper forms.

Another witness, whose business was to take charge of the mica department of the General Electric Co., in Schenectady, N. Y., said that he was familiar with the varieties of mica, and that imported mica came in blocks and splittings; that block mica is mica that has been rough trimmed at the mines or at some clearing house, and all imperfections trimmed off, and trimmed down, so that everything that comes in is in perfect shape; that block mica is sometimes punched out to form segments, and that in other cases it is cut and split down for various purposes, and that split mica is built up into plates in various shapes for insulation purposes.

Another witness, qualified as one having had 40 years' experience in buying and selling mica, said that the only trade terms that he knew of were cut or uncut mica; that these terms have a uniform and general understanding; that within the term “cut” mica was included mica cut to some definite form or shape; that “untrimmed” mica

might mean anything where the edges were removed in any shape or manner; that "rough trimmed" mica was only a local term used in some places, but not generally in the buying or selling of mica; that mica is bought or sold as cut or uncut, and that uncut mica might cover untrimmed or closely trimmed mica, but would not cover mica that was trimmed to a pattern. This witness was asked by the general appraiser how he would know with what to fill an order for uncut mica. His answer was:

If it was rough mica mined like these crystals we should offer it as that; if it was in the advanced stage, we should, according to the stage, whether roughly split and not trimmed or roughly split and trimmed— \* \* \*. It is all uncut mica until it has been cut with the knife.

He said that cutting would be in the nature of some trimming, according to the amount of cutting done. Speaking with a trade understanding, he regarded Exhibit 2, offered in evidence, as rough-trimmed mica, or mica partly trimmed with a knife, but an exhibit marked 1 as mica splittings. Witness stated that the object in roughly trimming the edges of mica is to split it easily; that an exhibit numbered 5 was rough-trimmed India mica which could not be used until it was cut into some shape or size, and that it was usually cut with a fixed bench shears, using a pattern.

Exhibit 1 appears to be an amber-colored mica, very thin sheets, with edges not regularly cut. Exhibit 2 was also amber colored, of thicker sheets than Exhibit 1, but with edges in part regular and as if roughly trimmed by some instrument. Witness called Exhibit 3 India mica splittings. They are exceedingly thin sheets with irregular edges. Exhibit 5 is mica, thicker than Exhibit 1, and evidently has been trimmed with a knife in a rough way.

Another experienced dealer in mica said that among dealers rough-trimmed mica and India or block mica are practically identical, and that the block mica included thumb-trimmed or knife-trimmed mica.

Still another witness of many years' experience in the mica business said that mica was imported into the United States as splittings, cut mica, uncut or block mica; that mica was called thumb trimmed, which may be knife-trimmed mica, mica that is not cut to a definite rectangular or other shape; that cut mica refers to mica cut to a definite size or design; and that knife trimming often means rough trimming of edges so that the mica can be split; and that in thumb trimming a knife was used, but not regularly, to cut to straight lines.

It is a fair deduction from this and other evidence in the record that dealers in mica recognize mica splittings, cut mica, and uncut mica. But we need not dwell at length upon various distinctions which may exist generally, for it has been agreed upon by counsel in the present case that the witness Westover's statement can be regarded as substantially correct. Mr. Westover is the secretary of the General

Electric Co., in charge of the mining of mica for the company, and undoubtedly his experience for 15 years in importing and looking after the manufacture of mica enables him to speak with accurate knowledge of the subject. He describes mica in its different stages in this way:

- (a) "Run-of-mine" mica, in its primary condition as taken from the mine.
- (b) Mica that has been "rough cobbled," i. e., split into pieces a quarter of an inch or half an inch thick, with the rock and waste removed, with a loss of about 40 per cent in weight.
- (c) "Thumb-trimmed" mica which has been split to a thickness of one-eighth or one-sixteenth of an inch and cleaned, and whose rough edges have been taken off, chiefly by hand, but partly by the use of a hand knife.
- (d) "Knife-trimmed" mica, made by trimming Class C with a machine knife, to remove all imperfections and give a smooth edge so that the mica may be cut to a design or may be split into very thin sheets. The loss caused by this operation is from 10 to 13 per cent.
- (e) "Splittings" from 1 mill to  $1\frac{1}{4}$  mills in thickness.

We find that there is substantial evidence which was introduced by the importers to the effect that the mica involved herein was irregularly trimmed; that it could not be put to any immediate use in the form in which it was imported; that in changing the so-called thumb-trimmed mica to what is spoken of as rough knife-trimmed mica, the thumb-trimmed was advanced in value approximately 10 per cent, but that this advance was counterbalanced approximately by the loss sustained by the owner; and that in converting the so-called rough knife-trimmed or uncut mica into cut mica, the loss sustained was 50 per cent or more, and the advance in value 100 per cent or more.

It is admitted by counsel for the Government that the term "cut" mica has a definite commercial meaning, limited to mica that has been cut to some definite shape or size, and that none of the mica involved in this case has been so cut. Nevertheless, it is argued by counsel that there is a character of trimming of mica that is covered by the statutory provision "mica, cut or trimmed," and that part of the mica under consideration has been trimmed in a way to require classification under the higher duty rate. This contention is based upon the argument that, although the term "rough trimmed," as used in the tariff act of 1909, does not refer to mica that is not cut or trimmed to definite shapes or sizes, yet it applies to mica that has been spoken of by some witnesses as knife-trimmed or thumb-trimmed mica or that mica which would be included within the definition of knife-trimmed mica or paragraph D of the definitions given by the witness Westover and heretofore quoted. Reduced to its simplest statement, the position of the Government involves the proposition that the words "cut" and "trimmed," as used in the statute, are not synonymous and are not used interchangeably.

To support this theory, the Government called witnesses who testified that there is a distinction between the terms "trimmed" and



"cut" mica. These witnesses qualified as persons familiar with commercial terms. A fair résumé of their testimony is that uncut mica includes various grades of trimmed mica, even though some such mica was trimmed beyond the stage of rough-trimmed mica. One of the witnesses said that there was a difference known in the trade between the words "cut" and "trimmed"; that cutting mica is "the cutting of it to a certain pattern that may require that mica can not be trimmed to a certain pattern but must be cut with a die or tool of some sort or other." Another witness said that "trimmed" and "cut" mica were not synonymous, in that trimmed mica is simply where the rough edges were taken off with a knife or sickle, while cut mica is that which is cut to forms or shapes with shears or dies and press; that rough-trimmed mica was synonymous with knife-trimmed; that Exhibit 5 (heretofore described) was knife-trimmed mica and not block mica. On cross-examination this witness said that knife trimming of mica did not change its shape substantially.

Another dealer in mica also said that the words "trimmed" and "uncut" were used in the sale of mica, but that cutting meant cutting with shears to exact sizes, while trimmed mica is where a knife or sickle goes around it or breaks off the edges by what is called thumb trimming; but that thumb trimming and rough trimming are practically the same.

Other dealers testified that "cut" and "trimmed" mica were not the same, "cut" mica being that which is cut to some definite shape or pattern, while "trimmed" mica is that which is trimmed, but not to any definite shape; that the India mica is closely trimmed; that Exhibit 5 is a knife-trimmed mica called closely trimmed.

One witness said that he regarded Exhibit 5 as "knife-trimmed" mica, and as being as closely trimmed as could be.

Another witness stated that in distinguishing between "trimmed" mica and what he called "rough-trimmed" mica the "knife trimmed" or "sickle trimmed" was better trimmed than "rough-trimmed" mica, in that one is done with a knife and the other with the hand.

As we read the evidence of the respective sides, bearing upon commercial meaning, we do not find it altogether satisfactory. The witnesses differed so materially and qualified their statements in such ways that it is difficult to take the record and to draw clear inferences.

But it was the opinion of the board, after seeing and hearing all the witnesses, that the evidence disclosed that none of the mica sheets covered by the protests of the importers were further advanced than "close trimmed" and "split." In their opinion, too, it was observed that none of the mica had been cut to any geometric shape or pattern, but that it was uneven in form and intended for purposes of manufacturing into mica plate or built-up mica. So, whether the evidence offered by the Government was sufficient to establish well-known

significations in regard to the trade meaning of the terms "cut" and "trimmed" and "rough trimmed," used in the tariff acts respecting mica, and which applied to the importations in the present case, or whether the evidence of the importers to the effect that "rough trimmed" mica refers to all mica, handled commercially, but which is not cut or trimmed to definite shapes or sizes, was convincing, presented questions upon which there was a serious conflict of view on the part of those who had dealt in mica for years, and who had had long experience in the commerce of the article. The board concluded that the evidence of the importers was of greater weight and we find no sufficient reason to hold to the contrary. Their conclusion finds support, too, in the practice which has existed in the customhouses of the country for many years, it having been decided more than once, under tariff sections like 91, that mica cut or trimmed meant that which is cut into sizes and shapes ready for use. This general view was followed in Abstract 377 (T. D. 25023). Again, as persuasive, it appears that at the tariff hearings had before the Committee on Ways and Means of Congress, in 1908 and 1909, attention was invited to the distinction recognized by the trade between "thumb-trimmed" and "knife-trimmed" mica, and although it was requested that more definite provisions be made for "cut" and "uncut" mica, and for a "closely trimmed" mica, as distinguished from "rough trimmed," no action was taken or change in that particular made. This is important, because, as indicated, section 184 of the tariff act of 1897 and paragraph 91 of the tariff act of 1909 are precisely the same in phraseology, except for the rate of duty upon "rough-trimmed" mica and "cut" mica, and words imposing an additional duty upon mica plates or built-up mica and manufactures of mica, or of which mica is the component material of chief value. It would seem to follow, therefore, that cut or trimmed mica means mica cut or trimmed to geometric shapes or so cut or trimmed to definite shapes or sizes, that the mica is a finished product, as contradistinguished from a rough trim or rough knife trim, not finishing the product.

Nor can we sustain the counsel for the Government in their contention that the mica splittings are dutiable as mica cut or trimmed or as manufactures of mica. The splittings are proved to be from rough knife-trimmed or sickle-trimmed mica and appear to be no further advanced in trimming than rough-trimmed mica. They are irregular in shape, and as imported are not ready for use. It is also quite clear to us that the splittings are not manufactures of mica. There has not been such an application of labor as to transform the mica into a new and different article "having a distinct name, character, or use." *Baumgarten v. Magone* (50 Fed. Rep., 71).

To produce splitting, application of some labor has been had, but it does not follow, of course, that they are manufactured articles within

the meaning of the tariff laws. Bamboo, split and cut into foot lengths and bound for shipment, has been held not to be a manufactured article. *Brauss & Co. v. United States* (120 Fed. Rep., 1017). And it has been held by the Board of General Appraisers that mica plate made of splittings by pasting the splittings together with shellac and alcohol is not a manufacture of mica. G. A. 6470 (T. D. 27682).

*Myers et al. v. United States* (110 Fed. Rep., 940) is in point, in that it was held by Judge Cox that small sheets or pieces of mica which had fallen off in the process of thumb trimming, varying in width from 1 to 2 inches and in length from 2 to 3½ inches, were unmanufactured mica and dutiable under paragraph 184 of the tariff act of 1897, the court declining to hold that the merchandise was waste not specially provided for.

As these views dispose of the more important features of the case, it follows that the decision of the board must be *affirmed*.

MONTGOMERY, Presiding Judge, and DE VRIES, Associate Judge, took no part in the hearing or decision of this case.

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HOLBROOK v. UNITED STATES (No. 77). KLIPSTEIN v. UNITED STATES (No. 80). SWAN v. UNITED STATES (No. 78). WELCH v. UNITED STATES (No. 81). OIL SEEDS CO. v. UNITED STATES (No. 79). HOFFMAN v. UNITED STATES (No. 82).<sup>1</sup>

1. REVIEWING QUESTIONS OF FACT.

Findings of the Board of Appraisers on doubtful questions of fact, turning upon the intelligence or credibility of witnesses, will not be disturbed, but when a finding would appear to be clearly contrary to the weight of the evidence, it is a duty devolved on this court to disregard it. *United States v. Reibe, supra*, p. 19 (T. D. 30776).

2. OLIVE OIL FOR MANUFACTURING OR MECHANICAL PURPOSES.

This importation, it seems, by a marked preponderance of the evidence, consisted of olive oil made of decayed fruit and shipped in a variety of containers, such as petroleum barrels or fresh goatskins; that it was ill smelling and rancid to the taste and was used generally for manufacturing purposes: *Held* the oil was not edible, was fit only for manufacturing or mechanical purposes, and was so free of duty under paragraph 626, tariff act of 1897.

HUNT, Associate Judge, dissenting.

United States Court of Customs Appeals, February 15, 1911.

APPEALS from United States Circuit Court for Southern District of New York (T. D. 29388; T. D. 30188).

[Reversed.]

*Frederick W. Brooks* and *James L. Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*John A. Kemp* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

By agreement of counsel the cases of these six importers are heard together. They were likewise heard and considered together by the

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<sup>1</sup> Reported in T. D. 31317 (20 Treas. Dec., 307).

Board of General Appraisers and by the Circuit Court for the Southern District of New York.

The importations are olive oil made at the port of New York in 1908. There are 19 protests covering 21 different lots of oil, each of which is represented by an agreed sample. As the record is made, we are unable to determine which, if any, particular sample represents any particular importation, and are unable to distinguish between the importations and treat them all as one. In other words, all are tested by the same rules and stand or fall together.

This oil was assessed for duty under paragraph 40 of the tariff act of 1897, the material part of which is as follows:

40. Olive oil, not specially provided for in this act, forty cents per gallon; in bottles, jars, tins, or similar packages, fifty cents per gallon.

The merchandise is claimed by the importers to be entitled to free entry under paragraph 626 of the same act, the material part of which reads:

626. \* \* \* olive oil for manufacturing or mechanical purposes fit only for such use and valued at not more than sixty cents per gallon. \* \* \*

It is agreed that these oils were valued at not more than 60 cents per gallon. The Board of General Appraisers sustained the collector's assessment, the Circuit Court for the Southern District of New York, upon the evidence taken before the board, affirmed its decision, and the cases are here on appeal by the importers.

The real question before us is whether upon the evidence we will reverse the judgment of the Board of General Appraisers and the Circuit Court, which was, in effect, that these olive oils at the time of importation were fit for other than manufacturing or mechanical purposes within the meaning of paragraph 626.

In the case of *United States v. Reibe*, heard at the June session, supra, p. 19 (T. D. 30776), the question of our authority to review questions of fact was considered and it was held that the provisions of the organic act establishing the court unquestionably vested it with such power. It was there held in substance that the court would not undertake to disturb the findings of the board upon doubtful questions of fact which turn upon the intelligence and credibility of witnesses that have been produced before the board, but when the finding of fact is wholly without evidence to support it or when it is clearly contrary to the weight of evidence, it is the duty of the court to disregard it, and we may now well add that the exercise of this power is one of the highest duties cast upon the court.

The organic act provides without distinction between them that questions of fact as well as of law shall be reviewed and a due regard for the right of litigants demands that in proper cases the power be unhesitatingly exercised. It is apparent that no hard and fast rule applicable to all cases can be expressed, but that each case must in a

large degree be decided in view of the conditions there found to exist. It is said by the counsel for the Government that there is so great a conflict in the evidence and so much that tends to support the findings of the board that we should affirm their findings. It is necessary to analyze the evidence sufficiently to see what facts were in issue and the character and quality of the evidence introduced material to their determination. At the outset we assume that all witnesses who were permitted to express their opinions upon the quality of these oils were, as the board evidently found them to be, qualified to give their opinion. We also have in mind that the presumption is in favor of the correctness of the collector's classification and the burden upon the importers to affirmatively sustain their material contentions.

The cases were tried below and argued here by the Government upon the theory that the oils in question were not, within the meaning of the statute, fit only for manufacturing or mechanical uses, because they were fit to be used for food purposes, and it was to that issue that the evidence of both sides was directed. The evidence of the importers, which was not contradicted by that of the Government, establishes the following propositions:

1. That the oil in question is manufactured and designed to be used for manufacturing or mechanical purposes. That with respect to the olives from which it was made, the manipulations it undergoes in manufacture, and the containers in which it is sent to this country less attention is paid to cleanliness than in the case of oils designed for food purposes. To briefly illustrate: This oil is made from partially decomposed olives, while the oil manufactured expressly for food purposes is made from sound olives. This oil is generally shipped in second-hand barrels, some of which have formerly contained petroleum or creosote, while the so-called edible oils are generally imported in clean and new containers. Some of this oil is brought to place of shipment in touloms, which are fresh goatskins recently stripped from the animals, having the holes resulting from the skinning process tied up.

2. That it was largely imported from parts of the Orient where relatively little oil designed for food purposes is produced.

3. That it was imported to be used for manufacturing or mechanical purposes and had been, so far as disposed of, sold or used for such purposes by the appellants, one testifying that he *used* 99 per cent of his importations in the manufacture of soap and others that theirs was sold by them for varying manufacturing and mechanical purposes according to the needs of their customers, to be used in the manufacture of silk and woolen goods, leather goods, soap, etc., but it does not clearly appear what part of these importations in fact had been so used.

4. That they were fit for use for manufacturing or mechanical purposes.

The appellants also introduced evidence that warrants the finding that these oils were not and could not be sold in the market as edible oils unless it is rebutted by the evidence of the Government tending to show that they are suitable for food purposes.

Presumably, in recognition of the burden cast upon them, the importers went ahead and introduced evidence from which we very briefly quote. Unless otherwise stated in connection with the evidence of a witness, he testified that he had examined all of the 21 samples of the importations.

Mr. Snevily, who is manager of the Oil Seeds Co., appellant, testified that the oils were not edible; that they were rancid; that he smelled or tasted of every sample; that if smelling left him in doubt as to the quality, he tasted; that he swallowed oil from some of the samples and that it nauseated him, causing his stomach to gas for several hours after taking it.

Mr. Smith, of the Holbrook Manufacturing Co., appellant, testified that the importations were manufacturing or mechanical oils; that he caused samples from five barrels involved in the protests to be prepared in a salad dressing, which he tasted; that the effect upon him was unpleasant; that it produced an acrid, unpleasant taste in the back of his throat; that the oils were all rancid and showed evidence of decomposition.

Mr. Lewis, manager of appellant Swan & Finch Co., testified that the oils were fair specimens of commercial oils; that he sampled them by smell and not by taste; that he did not care to taste any; that he thought they were rancid, and that there were evidences of decomposition.

Mr. Sherrill, connected with the appellant Welch, Holme & Clark Co., testified that these importations were commercial oils; that he had tasted of some of the samples, without saying how many, and had examined them all; that those he tasted were very bitter and had an unpleasant taste, and that he thought they were rancid.

Mr. Frederick, manager of the appellant firm of Arnold Hoffman & Co. (Inc.), testified that the oils all belong to the commercial class; that they were of poor quality and rancid.

Mr. Morawetz, of the appellant firm of A. Klipstein & Co., testified that he smelled all of the 21 samples and tasted of 3; that after tasting 3 he was happy to get out into the fresh air, and then went back and smelled of the others; that he found them all to be rancid.

Mr. Moellhausen, an importer of oils, but not a party, testified that the oils were not edible; that his testing was to find out the acidity, the taste, and the smell.

Mr. Athanassiades, an importer, but not a party, testified that the importations were commercial olive oils; that he could determine this by taste and smell; that commercial oil is rancid, is decomposed oil.

Mr. Newcomb, who represents several importing houses that are not ties, testified that he had tasted of four or five of the exhibits and

had smelled of all the others; that they were all mechanical oils and not edible; that he could not sell them as edible oils.

The three witnesses last mentioned amongst other things also testified as to the methods used in the Orient in the production and manufacture of similar oils.

Mr. Fuller, who is the head of the food division of the health department for the city of New York, but not a chemist, testified that he tasted of about 6 of the 21 exhibits selected at random and smelled of all of them; that he was sick all of the afternoon afterwards; that he thought that all were rancid, and he tasted those concerning whose rancidity he had any doubt; that he would have condemned every sample as unfit for food if offered for sale as such; that they were unfit for eating.

Mr. Sharples, a chemist of years of experience, some of the time in the Government employ and some of the time in the employ of the State of Massachusetts, testified that he had examined every sample, smelling all and tasting several concerning which he had doubt; that they were all strong-smelling, acrid oils, none of them having the beautiful nut-like flavor of a good olive oil; that the rancidity of these oils would condemn them without an analysis.

Mr. Pascual, an importer but not a party, testified that the exhibits were commercial oils and not edible oils; that he smelled of them but did not taste any; that he could tell by smell alone whether or not an oil was a commercial oil.

Mr. Hoese, a commission merchant and broker but not a party, testified that the samples were commercial and not edible oils and would not be salable in the United States as edible oils.

Mr. Hardy, of the firm of Maynard & Child and not a party to the suit, testified that he had examined six of the exhibits and that they were commercial oils.

The witnesses relied upon by the Government to sustain its claim that these oils are edible are Dr. Wiley, chief chemist of the Bureau of Chemistry of the Department of Agriculture and head of the food-inspection service under the food and drugs act, and Dr. Doolittle, the chemist in charge of the New York laboratory of the Bureau of Chemistry of the Department of Agriculture, and Mr. Kleine, the United States customs examiner, who passed upon the importations in question.

Drs. Wiley and Doolittle are chemists of long experience and have also had much experience in examining olive oils. Dr. Wiley did not chemically test any of the exhibits, but relied on the chemical analysis made by Dr. Doolittle embodied in Exhibit G. He testified that he tasted and smelled only five or six of the sample exhibits picked out at random and that they were brilliant in color, attractive in appearance and not bad tasting or smelling, but were edible. He later said he would admit as fit for consumption those which he tasted and whose

analysis he had seen. Speaking of edible olive oils generally, he said they average to contain  $1\frac{1}{2}$  per cent of free fatty acids, and very frequently 2, 3, or 4 per cent and occasionally 5 or 6 per cent, seldom above that, and that a percentage of 4.72 was extraordinarily high. In another connection, he said if rancidity had not advanced to any great extent, it did not render the oil unfit for eating. Again, he said if he were a physician prescribing olive oil for a patient's use in cases of constipation, he would prescribe a much better oil than the exhibits in question, and that if he were choosing edible olive oils, he would not choose any of these exhibits for himself. He preferred a better oil.

The doctor's idea of what is an edible oil may be gathered from the following extracts from the record:

Q. How much rancidity has a given oil got to have to be unfit for consumption?—A. So much so that it could not be eaten by the people who commonly eat oil.

Q. You mean by the average citizen?—A. The people who are used to eating oil; specially foreigners, who eat more foreign oils than Americans; Italians and Greeks, anything that they can eat would be a food product.

Q. Anything that they can eat would be fit for consumption?—A. No, sir; but would be a food product.

Q. It is edible if they can eat it?—A. It is edible if they can eat it. It might not be fit for food.

Q. It might not be fit to eat, although edible?—A. Yes.

Q. But it is not fit to be eaten because it is eaten?—A. If it is eaten it is edible; if it is used for food, it should pay duty.

Dr. Doolittle testified that he made a chemical and physical examination of each of the 21 samples and that the results of same appeared on Exhibit G; that he smelled and tasted of each sample; that they were all edible oils, such as are ordinarily used for consumption, as having come within his experience, and by referring to Exhibit G it will be noted that he detected no rancidity. It does appear there that, as to seven samples, he found them to be slightly resinous or detected a slight resinous-like aftertaste, and, as to three others, he reported that their taste was a little off or that they were not good tasting, but these unfavorable conditions were not sufficient, in his opinion, to render such samples unfit for food.

When specially interrogated if all these oils could be commonly used for edible purposes, he said: "They might be; they are suitable for edible purposes;" that if an oil smelled bad it would be unfit for human consumption; if it had a repulsive taste, it would likewise be unfit; and that there was no standard of taste or smell except that of experience, and his standard was his individual experience. Rancidity, he said, produced a bad taste in the back part of the throat, with a sort of a contraction of the back part of the mouth. He said if oil contained more than 4 per cent free fatty acid, it should be examined pretty carefully. His chemical analysis (Exhibit G) shows each sample to contain free fatty acid, ranging from a minimum of 1.60 per



cent to a maximum of 6.32 per cent. The aggregate of these percentages divided by the number representing the samples gives an average of 3.45 per cent.

Mr. Kleine testified that he tested each sample by taste and smell; that he smelled for the odor and tasted to detect a rancidity or bad taste. His experience in testing oils was confined to three and one-half years' service as examiner. He considered as edible those oils he would eat himself, and one he would not eat he considered nonedible, and did not take into consideration whether others would or would not eat them. If the oil was good enough for him to eat, he passed it for duty; if not, he passed it free.

It is clear from the evidence that there is not sufficient acidity in these oils to render them nonedible, although its existence in a degree so much above the average in edible oils may be a suspicious circumstance. Acidity, however, is only one quality to be considered in determining edibility. Rancidity, bad smell, and bad taste are at least equally important, and the evidence shows that rancidity is probably due to decomposition.

The witnesses all agreed that rancidity can not be detected by any known chemical test, but resort must be had to the exercise of the sense of smell or taste or both to find it. Two of the Government's witnesses did not discover it in any of the samples, and the other did not find it in six of them and did not examine the others. All this is negative evidence. Six at least of the importers' witnesses did discover it, and some of these said the oils smelled or tasted badly. This is positive evidence. In addition, there is the evidence of witnesses above referred to as to results which followed their smelling or tasting these oils. These results could not have followed had the oils been wholesome, and it seems to us that the methods which are shown to be employed in manufacturing, handling, and shipping these oils make it probable that similar results would follow an attempt to use them for human consumption.

There was no evidence tending to show that these oils were used as an article of food. The *theory* of the Government's witnesses that they are edible is not entirely satisfying. Especially is this true when we find positive evidence of seven witnesses, six of whom are not party to any of these suits, that they are not edible.

The consideration of the whole evidence results in this—the oils have been affirmatively shown to be nonedible. This proof is met only by evidence that witnesses did not discover its nonedibility. One is positive, the other negative. So far as mere number of witnesses is concerned, the preponderance is greatly in favor of the appellants. So far as ability and skill in testing oils for rancidity is concerned, we think the witnesses for the importers are at least the equal of those of the Government, and we are of the opinion that the

finding of the board that the oil is edible is clearly contrary to the weight of the evidence.

That part of the opinion of the board which reads as follows—

When it is remembered that all of the witnesses called by protestants, with two exceptions, are directly or indirectly interested in the success of protestants' claim, we think there is a preponderance of evidence to sustain the classification made by the collector. Especially do we think this view justifiable when it is remembered that the National Government has manifested its confidence in Drs. Wiley and Doolittle by placing upon them the responsibility of determining what foodstuffs may and may not be placed upon the markets of the country for sale as being fit for human consumption. A finding that their combined judgment as to these oils should not be accepted would, as we view it, be equivalent to saying that the confidence of the Government in their expert ability had been misplaced, and to this extent we are not prepared to go, nor could such a conclusion, in our opinion, be justified by the record—

we think discloses an erroneous rule for weighing the Government's evidence, which, had it not been adopted, would probably have resulted in a different conclusion. There is no evidence that witnesses other than the appellants are interested in the result. It is going far to assume from the fact that a witness is an importer or dealer in oils that he is not credible. It may as well be assumed that the Government's witnesses, all of whom are in its employ, are biased by the fact of their employment. It is certainly going too far to assume that a finding adverse to the evidence given by the witnesses for the Government is equivalent to an impeachment of their efficiency or ability in the official position they may fill, and it is error to let the fear of such a result influence the determination of a question of fact by a tribunal before which such witnesses may testify. They are, of course, like other witnesses, entitled to have the weight given to their evidence which under the circumstances—and their official position is but a circumstance—it is legally entitled to receive; nothing more, nothing less.

Upon the evidence we are satisfied it was the duty of the board and the Circuit Court to have found that the oils were fit only for use for manufacturing or mechanical purposes under paragraph 626. We so find, upon the evidence, and therefore the decision of the Circuit Court and the board is *reversed*.

#### DISSENTING OPINION.

HUNT, Associate Judge, dissenting: I am constrained to dissent. The question involved in the case was purely one of fact, upon which there was a serious and direct conflict of evidence. To resolve this conflict was peculiarly the province of the board, sitting as triers of fact. They saw the witnesses, observed their manner, heard their statements, and thereafter concluded that the weight of evidence was in favor of the view that the olive oils involved were edible.

After a careful reading of the entire testimony, including that of Drs. Wiley and Doolittle, produced by the Government, my opinion

is that the decision of the board is supported by evidence which is positive, substantial, and sufficient. For instance, Dr. Doolittle, a chemist of skill and experience and who made analysis of the oils, said in part:

\* \* \* The chemical examination was for the purpose of determining whether or not they were olive oil. I also submitted them to certain physical tests, smell, taste, appearance, color, etc., to determine whether they were fit for edible purposes. Food products are often submitted to me for examination. Among other things I examine olive oil from time to time to determine its quality and character. Speaking of the free fatty acids, free acids as oleic, that is a purely chemical analysis. The determination of free fatty acids is done chemically. It is a comparatively simple process. You simply take a given amount of the oil and dissolve it in neutral alcohol and titrate that against a standard solution of alkali. Alkali is to neutralize the amount of acid in that and from the amount of alkali it takes it gives the amount of acid there is present in the oil. From that I determine the free fatty acid there is in the oil or in any other substance. The process I have just given is one in common use for the determination of free fatty acids in olive oil. I made a determination of certain constants in the oil to inform me whether or not it was pure olive oil. We determined the specific gravity in most instances where we had plenty of material, the index of refraction, the iodine number, and then we tested them all for the common oils that would be used for adulterating olive oil, such as cotton seed, sesame, and peanut. These oils were pure olive oils. They were all of them found to be clear and of good color—that is, the ordinary color of olive oil ordinarily used for food consumption.

I submitted every one of these to a full examination, both chemical and what you might call physical examination, and went over them very carefully and wrote out my conclusion on each of the oils, and these conclusions are in this report signed by me. In my opinion, they are all edible oils, such as are ordinarily used for consumption, as having come in my experience—such as have come under my observation, imported oils in the market.

The credibility and weight of this testimony were for the board to pass upon. Having believed it, their conclusion ought not to be disturbed, unless in weighing the evidence they proceeded upon some erroneous principle. And whether they did or not is, to my mind, the one important point in the case. I agree thoroughly with my learned associates in their expression to the effect that fear of possible effects upon the reputations of experts for the Government can have no proper place in weighing evidence, and if it appeared to me that the board was directed to its conclusion because of the influence of such fears, I should concur in reversal of the case. But the opinion of the board puts its decision upon grounds independent of such moving causes by stating its finding before it proceeds to invoke the erroneous argument, declaring its view “especially \* \* \* justifiable.” Moreover, in its conclusion it reiterates the opinion that any finding other than that which it has made would not be justified by the record.

The case stands, therefore, as I look at it, as one where the presumptions in favor of the finding of the lower tribunal are strong enough to obtain and to require affirmance. *Manson v. Williams* (213 U. S., 453).

UNITED STATES *v.* HECKMAN (No. 89).<sup>1</sup>

## FUR SHEEPSKINS NOT WOOL.

Paragraph 360, tariff act of 1897, must be taken to refer to skins with wool upon them of such character and quantity that it would be profitable to remove this wool from the skins; and there being no question here that the importation of raw sheepskins was not of that kind, but was of skins the wool upon which could not be removed with profit, following the rule established by a long-continued practice in the customs administrative service, these were free of duty under paragraph 562, tariff act of 1897.—*United States v. Bennett* (66 Fed. Rep., 299), approved; *Lawrence Johnson & Co. v. United States* (124 Fed. Rep., 1000), and other cases distinguished.

United States Court of Customs Appeals, February 13, 1911.

TRANSFERRED from United States Circuit Court for District of Massachusetts, Abstract 21120 (T. D. 29715).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*John A. Kemp* on the brief), for the United States.

*Searle & Pillsbury* (*William E. Waterhouse* of counsel) for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation in question of raw Australian sheepskins with the wool on, was made at the port of Boston in 1908, and consists of two lots of skins, one containing 12 bales and the other 25 bales. The appraiser reported that on the 12-bale lot the wool was about an inch in length and on the 25-bale lot about three-quarters of an inch. These skins were assessed for duty by the collector under paragraph 360 of the tariff act of 1897 as "wools on the skin," and were claimed by the importers to be entitled to free entry under paragraph 561 of the same act as "furs, undressed," or under paragraph 562 as fur skins not dressed in any manner.

The respective paragraphs are as follows:

360. The duty on wools on the skin shall be one cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

561. Furs, undressed.

562. Fur skins of all kinds not dressed in any manner and not specially provided for in this act.

The appellees appealed to the Board of General Appraisers, who found that the skins—

are what are known as short-wool skins selected and imported specially to be made into fur articles, principally fur coats,

and further said that it had been—

satisfactorily established that said skins are in all material respects similar to those which were subject of the board's decisions in Abstract 17754 (T. D. 28634), Abstract 19272 (T. D. 29119), and Abstract 19545 (T. D. 29229),

and

since the Government has not appealed from the board's decisions holding skins of this character to be free, we follow the rulings in the cases cited and sustain the protests.

<sup>1</sup> Reported in T. D. 31318 (20 Treas. Dec., 316).

By referring to the cases cited it appears therein that the importations had in each case been sheepskins from China with the wool on, concerning which the board found that the skins were to be used for fur purposes exclusively, were suitable only for such purposes, and that it would not be profitable to separate the wool from the skins and use the same as wool.

By reference to these decisions and others of the board on the same or similar statutes and relating to similar importations, it is found that they are based upon the holding in *United States v. Bennett*, Circuit Court of Appeals (66 Fed. Rep., 299), which was decided in 1895, construing paragraph 387 of the act of October 1, 1890, which is as follows:

387. Wools on the skin shall pay the same rate as other wools, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe.

The importer had claimed free entry under paragraph 588 of the same act, which places on the free list "fur skins of all kinds not dressed in any manner."

The board had affirmed the collector's assessment, and the circuit court had reversed the board's decision. The importation was raw Angora goatskins.

In the Circuit Court of Appeals it was found that these skins—  
with the wool on are used exclusively as fur skins, and for no other purpose than as fur,  
and that—

it was not profitable to separate the hair from the skins and to use the hair as wool.

The court further said these skins were—

for all commercial uses undressed fur skins, and, while they are also literally undressed wool skins, or skins with the wool on, their classification for tariff purposes should not be under the head of wools, because practically they are not such; while bearing the name of wools, they are not the wools to which the wool schedule relates, and it is too close an adherence to literalism to classify them as something they are not—

and reversed the judgment of the Circuit Court and affirmed the decision of the board.

Under the law then in force the hair, or wool, whichever it might be, of the goat as well as the sheep was in terms dutiable, as was also the case under the tariff act of 1897.

No effort seems to have been made to review this decision of the Circuit Court of Appeals, and it has been followed by the board in numerous cases aside from those especially hereinbefore mentioned without, so far as has been called to our attention, any appeal having been taken by the Government therefrom.

In the *Bennett* case the length of the hair or wool on the skins was not mentioned, and the case turns upon the existence of two facts: (a)

That the skins with the wool on were used as fur skins exclusively. (b) That it was not profitable to separate the hair from the skins and use the same as wool.

Reference may be had to T. D. 10324, T. D. 13864, T. D. 18083, T. D. 20244, and T. D. 23247, concerning which the only comment we desire to make is that in a general way they all uphold the proposition that goat and lamb skins imported exclusively for fur purposes, when it appears that it is not profitable to separate the hair or wool from the skins, have been admitted free of duty under like statutes then in force as fur skins.

The Treasury Department under date of October 27, 1892, issued the following letter to collectors and other officers of the customs:

The department having, on the 23d of August last, designated a committee to establish a dividing line between shearling sheepskins, the wool on which has no commercial value and may be admitted free, and those on which the wool is sufficiently long to be subject to classification and, consequently, to duty, said committee on the 19th instant submitted the following report, which is hereby adopted as the rule for guidance of custom officers in the classification of imported shearling sheepskins:

"The wool on all shearlings has a commercial value, but, from the investigations made by this committee, we are of the opinion that wool on shearling sheepskins which does not exceed one-quarter of an inch in length on the body of the pelt is of such little value that the wool should be passed free of duty, and that all shearling skins where the wool exceeds one-quarter of an inch in length should be subject to duty."

O. L. SPAULDING, *Acting Secretary*.

From these decisions and the foregoing letter of the Treasury Department it is apparent that it has for many years been considered that there is a limit in length below which the wool on sheepskins, although perhaps strictly speaking in terms, dutiable under the wording of the statute, yet has been held not dutiable, because as wool it possesses no merchantable value when the expense of removing it from the skin is taken into consideration.

The Government contends here, however, that the Bennett case has been, in effect, overruled and cites *Lawrence Johnson & Co. v. United States* (124 Fed. Rep., 1000); *Lawrence Johnson & Co. v. United States* (140 Fed. Rep., 118); *Lawrence Johnson & Co. v. United States* (159 Fed. Rep., 189).

All of these cases relate to skins of the cabretta, which is a cross between a sheep and a goat. These cases are all to be distinguished from the Bennett case by the fact that in none of them does it appear that these skins with the hair or wool on the same were selected and imported for the purpose of using them exclusively as fur skins, nor does it appear that it would not be commercially profitable to separate the hair or wool from the skins and use the same for wool purposes, and our attention has been called to no case that, when considered, seems to be inconsistent with the Bennett case.

In the case at bar the board has found that the importation is short wool skins selected and imported especially to be made into fur articles, principally fur coats. They further say that the skins are in all material respects similar to those which were subject to certain of their decisions which we have referred to. This, amongst other things, we understand, means that the quantity of wool on the skins in question is so small that it would not be profitable to separate the wool from the skin and use it for wool purposes.

It is not claimed in argument by the Government that the finding of the board in this case is not supported by the evidence. The result is that the judgment in this case must be controlled by the ruling in the Bennett case, the reasoning of which is convincing to us, unless there is merit in the contention of the Government that the words "not specially provided for in this act," which were added to paragraph 562 of the act of 1897, and were not in the corresponding paragraph of the act of October 1, 1890, require a different conclusion, the claim being that the words "wools on the skin," in paragraph 360, specially provides for these skins so as to exclude them from paragraph 562.

It already appears that the Treasury Department has declared that wool not exceeding one-quarter of an inch in length upon the body of the sheepskin, regardless of the use made of the same, is not dutiable as wool because of so little value, and further that it has for a long time acquiesced in the holding of the court and subsequent rulings of the board that when the wool is of greater length if the skins carrying the same are used exclusively for fur purposes and the quantity of wool so small that it would not be profitable to separate the wool from the skins and use it as wool, such skins are not the "wools on the skin" within the meaning of paragraph 360 of the act of 1897. Such acquiescence in view of the classification by the board of such skins for so long a time is equivalent to an adoption of such construction by the Treasury Department of paragraph 360 of the act of 1897 and the equivalent paragraphs in former tariff acts.

The principle is well settled that—

The reenactment by Congress without change of a statute which had previously received long and continued executive construction is an adoption by Congress of such construction. *United States v. Falk* (204 U. S., 143, 152).

The addition in the act of 1897 of the words "not specially provided for in this act" to paragraph 588 of the act of October 1, 1890, would not, therefore, refer to sheepskins with the wool on, like the importations in this case, because the courts, the board, and the Government have held them to be fur skins and entitled to free entry.

Such skins are not within the fair construction of paragraph 360 of the act of 1897 in view of the long-continued construction given thereto and to corresponding paragraphs of the earlier acts. The skins with

the wool on referred to in that paragraph are skins carrying such a quantity and character of wool as is valuable in itself as wool after being separated from the skin, and which it is profitable to remove from the skin on which it grew. It then becomes capable of entering into competition with domestic wool which the purpose of paragraph 360 is to protect.

The importation in this case, however, does not enter into such competition, but is for tariff purposes fur skins, undressed, regarding which it is the policy of the law to admit free of duty.

The decision of the board is *affirmed*.

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UNITED STATES *v.* HOFFMAN-LA ROCHE CHEMICAL WORKS (No. 97).<sup>1</sup>

POWER OF BOARD OF GENERAL APPRAISERS TO ISSUE COMMISSIONS TO TAKE TESTIMONY.

Without considering the judicial nature of the Board of United States General Appraisers or the power that might be found to inhere in the board as a tribunal to issue commissions to take testimony, it would plainly appear that the statute under the authority of which it was established empowers the board to issue such a commission; and that a rule adopted by the board empowering one of its members to issue such a commission is well within the scope of the board's authority.

United States Court of Customs Appeals, February 13, 1911.

APPEAL from decision of the Board of United States General Appraisers (T. D. 30547). [Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

*Hatch & Clute* (*Edward S. Hatch* and *Walter F. Welch* of counsel) for the appellee  
Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

There is subject for decision here a question whether or not a board of three general appraisers has the power to issue a commission for a deposition to be taken in a foreign country.

The case involves the appropriate rate of duty upon certain imported merchandise, but it is conceded by the Government, appellant, that if the deposition was produced with authority and properly considered by the board the decision of the board should stand.

The authorities upon the general power of courts to issue a commission for a deposition without express statutory authority are not uniform. In some of the earlier cases an inherent power to so do was assumed and exercised by the courts, whilst in others reliance was had upon express statutes. *Greenleaf's Evidence* (sec. 320 *et seq.*).

The court is of the opinion that reliance upon any inherent power in the premises is unnecessary; nor is any consideration here of the judicial character of the Board of General Appraisers required. Even assuming the commission to have been issued by a single general appraiser, he was not without warrant of authority.

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<sup>1</sup> Reported in T. D. 31319 (20 Treas. Dec., 320).



The customs administrative act, as amended and in force at the time the commission was issued, contains the following provisions:

SEC. 12 of SEC. 28. \* \* \* That the boards of general appraisers and the members thereof shall have and possess *all the powers of a circuit court of the United States* in preserving order, compelling the attendance of witnesses, and the production of evidence, and in punishing for contempt. \* \* \* and the general board of nine general appraisers, each of the boards of three general appraisers, and each of the general appraisers of merchandise, shall have all the jurisdiction and powers and proceed as now, heretofore, and herein provided.

At the time of the enactment of this law there was vested in the circuit courts of the United States by section 863 of the Revised Statutes a general power for the taking of depositions setting forth with precision the procedure in such cases.

That a deposition is evidence seems so perfectly patent to the legal mind that the citation of authority or any attempted discussion would seem to challenge the intelligence of the mind addressed.

In all of the texts treating the subject, in all of the decisions which we have been able to examine, wherein depositions are the subject of discussion, in all of the codes of the States, and the Revised Statutes of the United States, depositions are treated in the chapters with and as a part of and class of evidence.

The circuit courts of the United States by statute having plenary authority for the issuance of commissions to take depositions, and the Congress having thereafter provided expressly that a single general appraiser, as well as boards of general appraisers, shall—

have and possess all the powers of a circuit court of the United States in preserving order, compelling the attendance of witnesses, and the production of evidence, it would seem that no grant of a power could be more clearly and precisely made.

There is no statute which we have been able to discover which denies any Federal court the power to issue a commission for depositions. It follows, without question, that if no statute has been contravened in issuing the commission for the deposition, the statutory authority granted circuit courts having been precisely followed, the general appraiser was within his powers. The court, however, upon this record does not find it necessary to rest its decision solely upon the grounds stated.

The record discloses that application for the commission was made to a board of three general appraisers, and objections were made before said board to the issuance of the commission on the grounds presented to this court upon appeal. The board overruled the objections and in accordance with that ruling the commission was duly issued. While the commission itself is signed by a member of the board it purports to emanate from the board itself, and the interrogatories and cross-interrogatories appear from the record to have been settled by the board. We assume from the record that the general appraiser acted for and under the authority of the board.

It is further provided in section 12, as follows:

SEC. 12 of SEC. 28. \* \* \* The said board of nine general appraisers shall have power to establish from time to time such rules of evidence, practice, and procedure, not inconsistent with the statute, as may be deemed necessary for the conduct and uniformity of its proceedings and decisions and the proceedings and decisions of the boards of three thereof; \* \* \*

In pursuance of this authority the board of nine general appraisers duly adopted rules of procedure, etc., part of which read as follows, to wit:

DEPOSITIONS.

XXV. Commissions will be issued under the seal of the general board to examine witnesses resident in another country or in a distant part of the United States not visited by a general appraiser, whenever it shall appear satisfactory to a general appraiser of board of general appraisers before whom the case is pending that the testimony of said witnesses is necessary and important in a case pending and that the witnesses can not attend the trial thereof.

\* \* \* Such commissions \* \* \* shall be written down and the commissions executed in the manner prescribed by section 875 of the Revised Statutes of the United States, whereupon the commission shall return the same to the chief clerk of the General Board of General Appraisers; and the same shall thereafter be considered competent evidence in the case.

The statute grants the board of nine general appraisers, which is the General Board of General Appraisers, full authority to make such rules and regulations and to adopt such procedure as in its judgment may appear necessary or proper.

In the rule adopted the board appears to have prescribed that a board of three general appraisers in authorizing the issuance of a commission to take testimony may do so either acting as a board or by availing itself of the offices of a single general appraiser in the premises.

In this case the board seems to have authorized the issuance of the commission, and, though it does not expressly appear upon the record that it directed that it should be signed by a single general appraiser, such was authorized by the statute and the rule, and it must be assumed that the public officials and the public official acting did so authoritatively.

The statutory authority of the board to make rules of procedure would seem to be ample for the adoption of the rule in question, it not contravening any statute.

In England the supreme court of judicature was authorized by statute, when created, to establish rules of court "for regulating the pleading, practice, and procedure in the high court of justice and court of appeal," and "generally for regulating any matters relating to the practice and procedure of the said courts, respectively, or to the duties of officers thereof," etc.

Under this authority of statute rules were adopted by the said court regulating the issuance of commissions for depositions. While this is

not an adjudged case on issues made, it is the exercise by a high court of statutory prerogatives requiring in the first instance the assumption by the court that it was within its legal powers under the statute.

We have no doubt that in this case the Board of General Appraisers was well within its authority and so acted.

Some objection was made at the hearing that the interrogatories returned were not properly introduced in evidence. We think that it may be fairly assumed from the record that they were properly introduced and considered by the board. The proceedings recited in the record bear out this conclusion. Moreover, the rule of the board prescribes that when a deposition is returned to the chief clerk of the board it becomes a part of the record and evidence in the case, for the rule states:

The commissioner shall return the same to the chief clerk of the General Board of General Appraisers; and the same shall thereafter be considered competent evidence in the case.

*Affirmed.*

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UNITED STATES *v.* SPIELMANN (No. 102).<sup>1</sup>

UNSTITCHED GLOVES.

The question being one of fact simply, and only one witness being called, who testified the gloves of the importation were not stitched or embroidered with more than three single strands or cords, and the Board of Appraisers having found this to be the fact, this finding will not be disturbed.

United States Court of Customs Appeals, February 13, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 29559).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

*Brown & Gerry* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The appellees imported at the port of New York certain gloves which were confessedly dutiable under paragraph 443 of the tariff act of 1897. They were also assessed the cumulative duty provided in paragraph 445, which reads as follows:

\* \* \* On all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs.

This duty was assessed upon the theory that the gloves were stitched or embroidered with more than three single strands or cords. The appellees seasonably protested against the imposition of the cumulative duty.

It appears that but one witness testified before the board, and he was an employee of the appellees. Upon his evidence, none being

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<sup>1</sup> Reported in T. D. 31320 (20 Treas. Dec., 323).

introduced to meet the same, the board found that the gloves involved were not stitched or embroidered with more than three single strands or cords and sustained the protest.

The single question before us is, Should this finding of the board be set aside?

Whether these gloves were stitched or embroidered with more than three single strands or cords, is, so far as this case is concerned, purely one of fact.

The witness before the board seems to have been possessed of sufficient experience, skill, and knowledge to enable him to testify upon the question under consideration and his testimony, as the board says, is emphatically to the effect that the gloves in question were not stitched or embroidered with more than three single strands or cords. The Government has chosen to rest the case on this testimony and the exhibits.

We think the presumption in favor of the collector's action is amply overcome by the evidence and that the board was justified in finding that the gloves were not stitched or embroidered with more than three single strands or cords.

The result is that the decision of the Board of General Appraisers is *affirmed*.

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ROSSMAN *v.* UNITED STATES (No. 107). ROSSMAN CO. *v.* UNITED STATES (No. 108).<sup>1</sup>

1. CHIPS OF MARBLE, CRUSHED AND SCREENED.

Marble chips, known as marble waste, that have been crushed and screened, being thereby advanced in value and taking another name as well, are not crude mineral but manufactured articles.

2. ADMINISTRATIVE CONSTRUCTION.

It is true administrative usage furnishes some support for the contention of appellants, that granito was free of duty under paragraph 614, tariff act of 1897, yet, it hardly appears there was such a long, uniform, and well-settled construction of the statute by the Treasury Department that the Congress can be presumed to have intended by that paragraph to declare granito, among other articles, free of duty. It was not entitled to free entry and was dutiable under section 6, tariff act of 1897.

United States Court of Customs Appeals, February 13, 1911.

TRANSFERRED from United States Circuit Court for the Southern District of New York (T. D. 29613—T. D. 29673).

[Decision affirmed.]

*Hatch & Clute* (Walter F. Welch of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*W. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved in this importation is marble chips and waste of marble quarries and shops which, by the use of proper

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<sup>1</sup> Reported in T. D. 31321 (20 Treas. Dec., 324).

machinery for the purpose, has been crushed and screened, so that the resulting product is small pieces of marble of irregular shapes and different colors in three sizes. Before being subjected to these operations it is known as marble waste, and is practically worthless. Thereafter it takes the new and distinctive name of granito or terrazzo, is imported in bags, and is used in making so-called mosaic marble floors. These floors are made by sprinkling or scattering these small pieces of marble upon a mastic base, like cement, the exposed face of which is then ground or rubbed down by a machine or by hand so as to make a smooth surface. Before being used in the making of floors this product is worth from \$2 or \$3 to \$15 and sometimes \$18 or \$20 per ton.

The importation was assessed for duty at 20 per cent ad valorem under section 6 of the tariff act of 1897, which is as follows:

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

The importers claimed the merchandise was entitled to free entry under paragraph 614 in the free list of the same act, which reads as follows:

614. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act.

The Board of General Appraisers sustained the collector, relying upon *United States v. Graser-Rothe* (164 Fed. Rep., 205), which is a decision of the United States Circuit Court for the Southern District of Ohio, and will be later referred to. The board has found amongst other things that the merchandise in the case at bar is of the same character and has been subjected to the same processes as the importations in that case. There is no evidence tending to support a claim of commercial designation of these importations, and we understand no such claim is made.

In substance the appellants here contend—

(a) That the merchandise is a crude mineral, namely, marble, which has not been advanced in value or condition within the meaning of paragraph 614.

(b) That it must have been intended by Congress that the merchandise should be classified under that paragraph because it is covered by the ordinary meaning of the words employed therein, and also because, as they claim, the statute in question and like statutes in preceding tariff acts have for a long time by Congress and the Treasury Department been uniformly construed to give free entry to merchandise like that involved in this case.

The Government claims—

(a) That the marble has been advanced in value or condition by a process of manufacture within the meaning of said paragraph; that it has acquired a new name; that it has become fitted to a new use; and that it is an article wholly or partially manufactured within the meaning of section 6 of the act of 1897.

(b) That the construction whether expressed or implied placed by Congress or the Treasury Department upon the sections involved do not cover a sufficient period of time and are not so uniform as to bring the case within the second contention of the appellants.

We consider first the claim of the importers that this is a crude mineral not advanced in value or condition by refining or grinding or other process of manufacture.

It appears that the marble before being treated as above set forth is of little or no value, and that as a result of the treatment it has a considerable value, a small part of which we understand from the record is due to expense of transportation. As the appellants so well say in their brief, the last analysis of their first point is whether or not the crushing of these marble chips and waste and screening the same is a process of manufacture.

We have been referred to numerous decisions in which the meaning of the word "manufacture" has been considered, none of which are so like the case before us as to be controlling. The word "manufacture" in its ordinary sense means to make or fashion by working on or combining material or materials. As first used it naturally involved the application of hand labor, but now, owing to greatly changed methods of developing power, may and generally does involve the element of the use of machinery in the process of manufacture.

In *Hartranft v. Wiegmann* (121 U. S., 609) the Supreme Court construed paragraph 268 of the act of 1870 relating to "shells of every description not manufactured." It appeared that the shells had been prepared by cleaning off the outer layer by acid, then grinding off the second layer by an emery wheel; that the object of these manipulations was simply for the purpose of ornamentation, and that the shells were to be sold as ornaments.

In discussing the meaning of the word "manufactured" the court said—

The application of labor to an article either by hand or by mechanism does not make an article necessarily a manufactured article within the meaning of that term as used in the tariff laws—

and held the importations were not manufactured—that they were still shells, and used the following significant language:

They had not been manufactured into a new and different article having a distinctive name, character, or use from that of a shell.

In the case of *re Gardner* (72 Fed. Rep., 494), the Circuit Court for the Northern District of California construed paragraph 511 of the act of 1890 which provided that "bones, crude, or not burned, calcined, ground, steamed, or otherwise manufactured" should be entitled to free entry. It appeared that the bones in that case had been crushed and screened. The court held, the importer's claim to the contrary notwithstanding, that crushing was equivalent to grinding within the meaning of that paragraph; that the word "manufactured" therein seemed to be given a definition by the paragraph itself different from the definition in *Hartranft v. Wiegmann* in that it appeared to regard burned, calcined, or ground bones as manufactured bones and adjudged the importation was not entitled to free entry under paragraph 511.

In the case at bar the importation has been substantially increased in value. It has been subjected to labor and mechanical treatment which has largely contributed to its increased value. It has taken a new and distinctive name which does not appear to be related to the original product and is devoted to a use to which it seems waste marble has not formerly been applied. The statute applicable seems to imply that grinding or refining are within its meaning deemed to be a process of manufacture, otherwise no force can be given to the word "other" in the paragraph.

If grinding be a process of manufacture we see no good reason for saying that crushing is not equally so. The operations are similar, the main difference being that in grinding the substance treated is more finely pulverized than is ordinarily understood to result from the crushing process. It is rather a difference of degree than otherwise.

We hold that the merchandise in this case is not entitled to free entry under paragraph 614 unless it becomes so by the force of the appellants' second contention.

By the ordinary meaning of the words employed in paragraph 614 we do not think Congress intended to apply the paragraph to marble which had been manipulated, had taken a new and distinctive name, and been increased in value as in this case, so there remains only for us to consider the claim that by reason of a long-continued and uniform construction of the paragraph by the Treasury Department giving free entry to like merchandise (if it be found to exist) these importations are entitled to be classified under paragraph 614.

In interpreting an ambiguous statute recourse may be had to the long-continued construction placed upon it by a department charged with its execution, and it is held that in such cases the courts will lean in favor of the construction given the statute by such department. Especially will this be done when contracts have been made and rights

vested on the strength of such executive construction. Such previous departmental construction, however, is not necessarily controlling.

Assuming but not deciding that paragraph 614 is ambiguous, we proceed to examine the appellants' claim in that regard. Preliminary to the consideration of this phase of the case it must be noted that the tariff acts of 1890 and 1894 contained provisions substantially identical with the provisions of the act of 1897, now under consideration. It also appears from the evidence in the case at bar that the appellants first began importing granito or terrazzo about the year 1898, since which time they have made yearly quite a number of importations of the merchandise at the port of New York and some at the port of Boston. These importations were all made subsequent to the enactment of the tariff act of 1897 and subject to its provisions.

By referring to the cases and rulings of the department to which we have been cited, and to some other cases, it appears that the Board of General Appraisers held in November, 1893, that crushed stone for macadamizing roads and other like purposes imported at Chicago, and assessed as an unenumerated manufactured article, was entitled to free entry as a crude mineral not increased in value or condition by manufacture. Following such holding, the Treasury Department directed the collector at Detroit to continue to return crushed stone as an unenumerated manufactured article. October 2, 1894, the board held that a like importation made at Detroit which had been assessed pursuant to the department's instructions was entitled to free entry. These decisions do not affirmatively show that the merchandise was in any way advanced in value or condition by a process of manufacture.

The following decisions of the Board of General Appraisers are also referred to:

February 4, 1904, the importation was at New York, appeared to be crushed or pulverized limestone and was shown to be "Caen" stone, which is a building stone obtained near Caen, Normandy. It had not been ground or pulverized or subjected to other like process. It was ground here, then mixed with other stone and used for making imitation stonework. It was assessed for duty as an unenumerated manufactured article and was held to be entitled to free entry under paragraph 614 of the act of 1897.

December 15, 1904, granito, which appears to be like the importation in the case at bar, was assessed as building stone and held entitled to free entry under paragraph 614. The importation appears to have been made at Baltimore and is the first case called to our attention in which the word "granito" is used to describe the article imported.

July 5, 1905, in one case "Caen" stone like that hereinbefore mentioned and in the other granito apparently like the importation in



the case at bar were held entitled to free entry under paragraph 614. Both importations were made at New York.

March 15, 1906, granito imported at New York was again held free under paragraph 614.

August 18, 1906, crushed stone imported at Port Huron and assessed as building or lime stone was held free under paragraph 614.

December 29, 1906, an importation of crushed marble at Chicago was held properly classified for duty as an unenumerated manufactured article under section 6 of the act of 1897.

June 26, 1907, an importation of granito or terrazzo made at Cincinnati and assessed as waste under paragraph 463 of the act of 1897 was held entitled to free entry under paragraph 614. General Appraiser Howell, however, while concurring with the board because of what he considered the controlling force of its prior decisions, nevertheless in a very clear manner stated his reason and authority for disagreeing with the principle of the decision. This case was taken on appeal by the Government to the Circuit Court for the Southern District of Ohio, *United States v. Graser-Rothe* (164 Fed. Rep., 205). The court held, quoting with approval the opinion of General Appraiser Howell, that—

The merchandise as imported has been converted from a comparatively valueless article into a commodity of use and value by a process of manufacture specially designed for the purpose. Labor and machinery have been used in producing it, and because of a manufacturing process it has acquired a new name and a new use. It is therefore no longer a crude mineral but a manufactured article—

and held the same dutiable accordingly. The merchandise in that case appears to have been identical with that in the case before this court.

It is suggested by the appellants here that in the last-cited case there was no appearance for the importers. It is not claimed, however, that the *facts* would have differently appeared had the importers been represented by counsel.

In addition to the cases above cited, it appears from the evidence in this case that these appellants from the time they began importing granito or terrazzo, about 1898, had been allowed to enter the same free of duty until some time in 1904; that then for about 13 months it was assessed for duty, which was paid under protest, some or all of which was later refunded on appeal; that then for 13 months they were again permitted free entry, but that since the last part of 1906 it has been assessed for duty as an unenumerated manufactured article under section 6.

Can it be said from the foregoing that there has been such a long-continued and uniform construction of the statutes in question on the part of the Treasury Department in allowing free entry to granito or terrazzo that we should follow the same in this case?

It is apparent from a brief survey of the situation, so far as appears in this case, that prior to the passage of the act of 1897 there were few importations of an article similar to that involved here and that none of them were known by the name of granito. It does not clearly appear to what process the same had been subjected and does not appear that the importations as a result of such process had been advanced in value or condition. We think it can hardly be said that at the time the law of 1897 was enacted there had been such a long, uniform, and well-settled construction of this statute by the Treasury Department that Congress can be presumed to have intended thereby to declare that merchandise like that in this case should be admitted free of duty. In fact, so far as anything appears in this case, it can not be presumed that Congress knew that granito was being imported.

Relating to importations made under the act of 1897, it appears that merchandise like that at bar has been assessed for duty under different sections of the act of 1897 at ports other than New York. That in 1906, at Chicago, crushed marble, the preparation and use of which does not appear, was held by the board to be properly classified as an unenumerated manufactured article. That the first and only time any tribunal other than the Board of General Appraisers has been asked to pass upon the question before us, the contention that the Government here makes was sustained.

So far as paragraph 614 of the act of 1897 is concerned, we do not think there has been such a long-continued and uniform construction thereof by the Treasury Department as can be successfully invoked here.

It does not appear that the department took any affirmative action to obtain a construction of this act until 1907, when in the case of *United States v. Graser-Rothe* it litigated the question and as a result the court construed the statute in harmony with the Government's present claim, and since the last part of 1906 like importations have uniformly been held dutiable under section 6.

Any presumption in favor of the construction contended for by the appellants that may arise from the fact that appellants were permitted free entry of their importations, as already appears, or from the fact that the department did not appeal from any of the decisions of the board holding like merchandise entitled to free entry, we think is amply rebutted by the position the department has taken since 1906.

We hold the merchandise in question is an article manufactured in whole or in part, not otherwise provided for in the act of July 24, 1897, and dutiable at 20 per cent ad valorem under the provisions of section 6 of that act.

The decision of the Board of General Appraisers is *affirmed*.

AUSTIN v. UNITED STATES (No. 160).<sup>1</sup>

## FRUITS PRESERVED IN SUGAR.

Fruits and berries that are put up in hermetically sealed containers in sirup composed of invert sugar, cane sugar, glucose, dextrose, and levulose in amounts varying from 43.39 to 67.56 per cent of the sirup, constitute fruits preserved in sugar and were dutiable under paragraph 263, tariff act of 1897.

United States Court of Customs Appeals, February 13, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York (T. D. 30099).

[Affirmed.]

*B. A. Levett* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation consists of various fruits and berries put up in hermetically sealed cans which contain, with the fruits and berries, a thick sweet sirup. A chemical analysis of this sirup shows that it is composed of invert sugar, cane sugar, glucose, dextrose, and levulose, aggregating from a minimum of 43.39 to a maximum of 67.56 per cent. The amount of cane sugar alone in the sirup as shown by the same analysis varies from 3.62 to 28.45 per cent. These analyses show the respective percentages after the articles have been imported. The analyst, however, testified, and the board found, that such analyses do not reveal the full percentage of cane sugar that was used in putting up the goods. The respective percentages of dextrose, levulose, and glucose present in the sirup do not appear, neither does it appear what composed the remainder of these sirups above the percentages stated.

The evidence shows that invert sugar is sweet and that glucose is a variety of sugar. Invert sugars are reducing sugars not different in physical appearance from cane sugars, and are sometimes made by treating cane sugar with a ferment or a dilute acid. It also appeared from the evidence that there was some cane sugar existing in the natural fruits which constitute the importation, and that the acid of the fruit would naturally tend to convert some of the cane sugar into invert sugar while the goods were being prepared, especially in the case of those in the lighter-weight sirups.

The board found that the fruits and berries so prepared were excessively sweet, "being preserved in a thick, sweet sirup;" that they were put up in the whole state in glass bottles, in a fancy or showy form pleasing to the view, and sustained the action of the collector in

<sup>1</sup> Reported in T. D. 31322 (20 Treas. Dec., 330).

assessing the same under paragraph 263 of the act of 1897, the pertinent parts of which are as follows:

263. Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act.

The appellants contended the same should have been assessed for duty under paragraph 262 of the same act which applies to—

\* \* \* Apples, peaches, pears, and other edible fruits, including berries, when dried, desiccated, evaporated or prepared in any manner, not specially provided for in this act. \* \* \*

The appellants' first claim is that the preservation of these commodities is due chiefly to the fact that they were hermetically sealed.

It appears that the containers were hermetically sealed, and it is obvious that such sealing must contribute to the preservation of the contents. The evidence, however, clearly shows that one of the preservative agents materially contributing to the preservation of the goods was the thick, sweet sirup surrounding the same.

We think that the evidence warranted the finding that the importation was preserved in a thick, sweet sirup and that they are dutiable under paragraph 263, unless we sustain the further claim of the appellants that if found to be preserved in *sirup* they are not preserved in *sugar* within the meaning of the paragraph. In other words, it is claimed that the preservative is *sirup* and not *sugar*, while the paragraph in terms requires the preservative to be *sugar*.

In its last analysis, as we understand it, the claim of the appellants is this: That however great the percentage of sugar in a liquid or sirup which is used as a preservative of goods like these, yet so long as it is *liquid* it can not be held to be sugar within the meaning of paragraph 263.

It is common knowledge that in the last stages of sugar manufacture the evaporation of a relatively slight amount of moisture from a sirup with sufficient time given for the same to cool results in sugar; that is, when the amount of water necessary to hold the sugar in solution is evaporated, crystallization ensues. The appellants' claim would require that a liquid in fact composed of nearly pure sugar should be held not to be sugar within the meaning of the paragraph. The appellants do not suggest any other line of demarcation between sugar and sirup. We decline so to hold and, without attempting to indicate the percentage of sugar or the kind of sugar that must be present in a sirup used as a preservative for fruits and berries, we are clearly of the opinion that the amount shown to be present in this case constitutes sugar within the meaning of paragraph 263.

The decision of the board is *affirmed*.

GROSS v. UNITED STATES (No. 451). HERSKOVITZ v. UNITED STATES (No. 452).<sup>1</sup>

## APPEAL AFTER MANDATE ISSUED.

In these cases a mandate having been issued on petition directing the court below to transmit the records to this court for adjudication, and it being contended the cases are not properly here on appeal, the petitions will be treated as applications for the allowance of appeals and the appellants will be permitted to withdraw the original petitions with certificates of the allowance of their appeals by this court, to be used in having the cases duly certified from the court below for determination here.

United States Court of Customs Appeals, February 14, 1911.

(Order entered.)

*Joseph G. Kammerlohr* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

**PER CURIAM:** On the hearing of these cases it was contended by the Government that the cases were not properly before this court for determination. The proceedings taken consisted of filing petitions in this court for the review of the decision of the United States circuit court affirming the decision of the Board of General Appraisers. A mandate was issued to that court by the clerk requiring the court to transmit the case to this court. It is contended that an allowance of the appeal should be had.

The law governing appeals to this court is contained in subsection 29 of section 28 of the act of August 5, 1909, the pertinent part of which reads as follows:

All customs cases heretofore decided by a circuit or district court \* \* \* which have not been removed from said courts by appeal or writ of error, and all such cases heretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party, by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decree sought to be reviewed.

The statute is silent as to the method of appeal. It is contended by the Government that this being so, appeals are governed by section 1012 of the Revised Statutes, which reads:

Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

This would seem to find support in the case of *Yeaton v. Lenox* (32 U. S., 220). In that case the court had under consideration the act of March, 1803, which gives the appeal from decrees in chancery and

<sup>1</sup> Reported in T. D. 31323 (20 Treas. Dec., 332).

which subjects it to the rules and regulations which govern writs of error. It was said that—

if the appeal be prayed, after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error. The judiciary act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record, the adverse party having at least 20 days' notice. This notice, we understand, is 20 days before the return day of the writ of error. In this case, the appeal is not allowed by the judge, and the citation is to appear before the court then sitting.

The petition filed in this court may be treated as an application for the allowance of an appeal, and an order will be entered allowing an appeal, and the appellant will be permitted to withdraw the original petition with a certificate of allowance of appeal by this court for use in certifying the case from the circuit court to this court. On the return of this proceeding the case now under advisement will be taken up for consideration.

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ROESSLER & HASSLACHER CHEMICAL CO. v. UNITED STATES  
(No. 150).<sup>1</sup>

DUTIABLE VALUE ON DATE OF EXPORTATION.

A shipment of goods from one point to another within a country for transshipment beyond that country is not, then, a true exportation, and such a shipment becomes a true exportation only and takes its valuation as of the date the vessel with these goods on board is cleared for the United States.—*Almy v. State of California* (24 How., 169) distinguished.

United States Court of Customs Appeals, February 27, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York  
Abstract 21579 (T. D. 29906).

[Affirmed.]

*Brooks & Brooks* (*Frederick W. Brooks*, of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

Certain bromides were imported under a bill of lading dated at Hamburg, April 7, 1906. Based upon the bill of lading, a pro forma invoice for the goods, dated April 7, 1906, at a valuation of 100 marks per 100 kilos, was given by the importers. The appraiser passed the invoice by adding 50 marks per 100 kilos to the invoice price, it appearing that the market price for such goods had been advanced April 5, 1906, from 100 marks to 150 marks per 100 kilos.

The importers obtaining later information that the goods were in fact shipped from Berlin or from the factory on the 31st of March,

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<sup>1</sup> Reported in T. D. 31353 (20 Treas. Dec., 408).

1906, they sent for a corrected invoice containing that date of shipment and stating the price of goods at 100 marks per 100 kilos. The collector assessed the duty on the valuation found by the appraiser, protest was filed and an appeal taken to the Board of General Appraisers, and their decision affirming the action of the collector is brought before us for review.

The importers claim that the invoice price was fixed at the figure of 100 marks per 100 kilos because of the clerical error in stating the date of the exportation. Reliance is placed on section 2904 of the United States Revised Statutes, which provides:

When the duty upon any imports shall be subject to be levied upon the true market value of such imports in the principal markets of the country from whence the importation has been made, or at the port of exportation, the duty shall be estimated and collected upon the value on the day of actual shipment, whenever a bill of lading shall be presented showing the date of shipment, and which shall be certified by a certificate of the United States consul, commercial agent, or other legally authorized deputy.

It is claimed that under this section the goods are deemed to be shipped when they are committed to a railroad company to be transported to the port and there reshipped to the United States. This section was enacted March 2, 1861. To ascertain the intent of the enactment, reference should be had to the state of the law existing at that time. In *Sampson v. Peaslee* (20 How., 571) and in *Irvine v. Redfield* (22 How., 170) it had been determined that the date of exportation was the date of the sailing of the vessel, and that even though goods were placed in the custody of the carrier and a bill of lading actually given no exportation could be said to have occurred until the actual sailing of the vessel. This being so, the section above quoted was enacted, and it would seem that the purpose of the enactment was to so far modify this ruling as to substitute for evidence of the date of the actual sailing of the vessel a bill of lading showing the date of shipment and containing a certificate of the United States consul, commercial agent, or deputy. It may be said that no such certified bill of lading has been produced. The evidence of the contents of the bills of lading given at Berlin is in the record, but it does not appear that they were bills of lading certified by the consular agent as required by this section of the statute.

However, we do not determine the case upon this technical omission, as we think it clear that this section must be read in connection with sections 10 and 19 of the customs administrative act of June 10, 1890, the former of which requires that the appraiser shall ascertain—

the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported.

Section 19 requires that duties shall be—

assessed upon the actual market value or wholesale price of such merchandise, as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States.

These sections make it clear that the date of exportation to the United States is the date as to which the valuation shall be fixed. The valuation is to be based upon the principal markets of the country whence imported, but it shall be as of the date of exportation. It is then important to inquire what constitutes an exportation to the United States from a foreign country. This question is not new, but has been before the courts in numerous cases. The case of *Forman v. Peaslee* (9 Fed. Cas., 452), decided in 1857, is in point. In that case the court construed the statute requiring the appraisers to ascertain the market value of the imports at the period of exportation to the United States. The goods had been shipped from Wales, in Great Britain, to Liverpool, and there reshipped to the United States. It was held that the transportation of the goods coastwise from one British port to another was not an exportation from Great Britain; that until the vessels having on board the goods were cleared from Liverpool there was no complete act of exportation. Until that time the property was held to be under the control of the English Government, whose order could have arrested and detained it within that country, and whose control over it would have been unaffected by the fact that it had been brought from Cardiff and Newport for the purpose of being sent to the United States.

The same question has arisen in several cases where the goods had been shipped by land carriage from the interior of Great Britain to the port of exportation. *Gibb v. Washington* (10 Fed. Cas., 288); *Hutton v. Schell* (12 Fed. Cas., 1095).

In *Gibb v. Washington*, the court, referring to *Forman v. Peaslee*, said:

The only difference between that case and the one at bar is, that in the one, the interior transportation was along the coast by water, in the latter, it was by land carriage from the interior to Liverpool. It is difficult to perceive how the mode of transportation can alter the application of the principle as to its cost.

That case would seem to be directly in point with the case under consideration.

It is claimed that a different meaning has been given to the word "export" by the Supreme Court in the case of *Almy v. State of California* (24 How., 169). We think the case is clearly distinguishable. The court there had under consideration the question of the constitutionality of a law of California imposing a stamp tax upon bills of lading. The law imposed a tax on bills of lading for the transporta-



tion from any point or place within the State to any point or place without the State of gold or silver coin, and requiring that there should be attached to the bill of lading, or stamped thereon, a stamp or stamps, expressing in value the amount of such tax or duty. The court construed the terms of the Constitution which declares that—no State shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

The court in its discussion said:

And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

We think the case does not make for the doctrine that a shipment from one shipping point within a territory or country to another for the purpose of transshipment beyond the realm constitutes an exportation. This would be opposed to the authorities which we have cited above, and to the common acceptance of the term as employed in the revenue laws for many years.

No error was committed to the prejudice of the importer, and the decision will be *affirmed*.

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MCBRIDE v. UNITED STATES (No. 183). BISCHOFF v. UNITED STATES (No. 184).<sup>1</sup>

TREASURY REGULATIONS CONCERNING WORKS OF ART IMPORTED FOR PRESENTATION.

By the tariff act of 1897, the Treasury Department was duly and lawfully authorized to prescribe regulations governing the allowance of exemptions from duty on works of art imported expressly for presentation; and the requirement in that act that there should be filed with the entry of such works of art an affidavit showing the importation to be of the kind contemplated by the statute must be taken to mean the affidavit so prescribed should have been filed at the time entry was made and not later.

United States Court of Customs Appeals, February 27, 1911.

APPEALS from decisions of the Board of United States General Appraisers (T. D. 30164 and Abstract 22512, T. D. 30234).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These two cases were heard together. The merchandise under consideration in each case consists of altars, shrines, and pulpits with

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<sup>1</sup> Reported in T. D. 31354 (20 Treas. Dec., 411).

statuary, railings, etc., imported for presentation to various Roman Catholic Churches. It was assessed for duty in part at 50 per cent ad valorem as manufactures of marble under paragraph 115 of the tariff act of July 24, 1897, and in part at 15 per cent ad valorem as statuary under paragraph 454 of section 3 of said act. It is claimed on the part of the appellants to be free of duty under paragraph 703 as works of art, expressly for presentation to incorporated religious societies. The Board of General Appraisers found that the articles, with the exception of the communion rail for one of the churches, are works of art, but held that duty was properly levied for the reason that the showing that they were imported for presentation to a religious corporation required by the Treasury regulations was not made at the time of the importation, and that a failure to comply with these regulations precludes the importers from now claiming the benefit of free entry. If the board was right in this ruling, other questions presented in the case become unimportant.

The paragraph of the statute reads as follows:

703. Works of art, the production of American artists residing temporarily abroad, or other works of art, including pictorial paintings on glass, imported expressly for presentation to a national institution, or to any state or municipal corporation, or incorporated religious society, college, or other public institution, except stained or painted window glass, or stained or painted glass windows; but such exemptions shall be subject to such regulations as the Secretary of the Treasury may prescribe.

Acting under authority of this section to make regulations relating to such importation, the Secretary of the Treasury prescribed article 720 of the Customs Regulations of 1908, which reads as follows:

ART. 720. *Presentation to Institutions.*—Works of art, including pictorial paintings on glass, imported expressly for presentation to any national institution, or to any state or municipal corporation, or incorporated religious society, college, or other public institution, may be admitted to entry free of duties, upon the filing with the entry of an affidavit by the importer showing that the articles were expressly imported for presentation to the institution named in the entry, together with letters of presentation and acceptance from the donors and donees, respectively.

The documents required by this regulation were not filed at the time the entry was made, and not until after liquidation had occurred. The customs officers were not afforded the opportunity therefore of determining in the first instance whether the goods were dutiable except as such determination was based upon the entry made. On the hearing before the board such papers were as to most of the importations supplied. The contention of the importer is that it is not necessary under this regulation that the letters of presentation and

acceptance from the donor and donee and affidavit required by this regulation shall be filed at the time of the entry, but that they may be filed later. The board held that the regulations should be construed to require the filing of the affidavit and letters of presentation and acceptance from the donors and donees, respectively, at the time of making the entry. There seems to be no contention but that the word "entry," as used in this connection, has the meaning ordinarily attributed to it in customhouse speech, and refers to the document which is required to be made and filed with the collector as preliminary to the entry of the goods.

What is the meaning to be attributed to the words "upon the filing with the entry?" If we take notice of what is to follow upon the filing with the entry of the required papers, it will be seen that it is an act of the collector which is to take place prior to liquidation. He is expected to pass upon the importation and to liquidate the entry, and the goods are to be admitted free of duty upon the filing with the entry of an affidavit by the importer and the other requisite papers. Obviously these papers must be before the collector for action, and they must be filed at a time which will admit of his taking such action. Otherwise it must be held that the usual function of the collector of liquidating the duties in such a case is one which may be ignored by the importer, and a showing subsequently made for original action by another tribunal. This is a construction of the regulation not to be accepted except upon extremest necessity. If there were doubt about this construction as based upon the usual course in proceedings before customs officers, article 721, immediately following the above section, makes it clear that such showing as is to be made is to be made to the customs officers. That article provides:

All such articles shall be examined by customs officers, and if found to be works of art within the meaning of the law and the collector and naval officer, if any, shall be satisfied that they were imported expressly for presentation to and were accepted by the institution the entry shall be liquidated free of duty.

This clearly imposes upon the customs officer the duty of passing upon the affidavit and letters provided in section 720, and as clearly imports that these documents shall be before him before liquidation shall take place.

In view of these provisions, it is not difficult to place a construction upon this language, "upon the filing with the entry." We think it is too clear to need discussion that what is meant by this language is that at the time the entry paper is filed there shall be filed with it the affidavit and letters provided for. Even if a technical view be taken, this is the only time when the importer has it within his power to file

the affidavit with the entry. The entry having gone beyond his control when filed with the collector, it would not longer be possible for him, the importer, to file any other paper with the entry. The collector might do this, but the importer could not, and it is very clearly an act of the importer which is required by the language which is employed in this regulation.

But more than this, in the ordinary meaning of the term "filing with" we think, in ordinary understanding, it implies not necessarily attaching to, but filing at the same time. Cases are not wanting to support this view, and they are cited in the brief of the Government. See *Hossler v. Hartman* (82 Pa. St., 53). A case arose in Iowa under a statute providing that before an allowance of attorney's fees should be made by the court, the court should be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit "shall be filed with the original papers," that there has been no agreement between the attorney and any other person to divide the fee. It was held that this required that the papers should be filed at the same time with the original papers. *Wilkins v. Troutner* (66 Iowa, 557; 24 N. W., 37).

The language employed by the court in deciding the case is peculiarly appropriate:

The statute uses the expression "filed with the original papers." It is said that "with" is not synonymous with "at the same time." Ordinarily this may be so, but we think it must be so construed in the statute under consideration. If this is not so, then the statute is meaningless, unless it can be said that the affidavit may be filed with—that is, placed among—the original papers, and filed at any time after judgment; and clearly this is not the intent of the statute.

It is equally clear in the present case that it could not have been the intention of this regulation that the papers offered for the purpose of showing that this importation was entitled to free entry should be filed after the customs officers have acted upon the entry and liquidated the same. Cases may be cited in which the words "filed with," under the peculiar wording of the statute or rule, have been held not to require that they should be filed at the same time. See *Hummert v. Schwab* (54 Ill., 142). But no case has been found treating of a regulation of statute such as that under consideration which militates against the views we have above expressed.

That the power to prescribe regulations of the character involved in these proceedings may be granted to the Secretary of the Treasury is well settled. See *Lunham v. United States*, *supra*, p. 220 (T. D. 31258), and cases there cited.

It necessarily follows from the foregoing conclusion that the decision of the Board of General Appraisers in each of these cases should be *affirmed*.

UNITED STATES v. VIETOR. (No. 207.)<sup>1</sup>

## 1. PROVISIO TO PARAGRAPH 402, TARIFF ACT OF 1909.

The proviso to paragraph 402, tariff act of 1909, "That tamboured, embroidered, or appliquéed articles or fabrics shall pay no less rate of duty than that imposed upon the material if not so tamboured, embroidered, or appliquéed," is operative only when it appears that the duty on the articles or fabrics with the appliqué removed would under paragraph 399 of that act exceed the duty at sixty per centum provided by paragraph 402.

## 2. SILK WOVEN FABRICS, APPLIQUÉED.

Articles composed of silk or mainly of silk or of silk and metal, and appliquéed, are not dutiable under paragraph 399, tariff act of 1909, but are dutiable under paragraph 402 of that act.

United States Court of Customs Appeals, February 28, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6979 (T. D. 30337).

(Affirmed.)

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

*John Durrell Smith* (*John Giblon Duffy* of counsel) for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers to the United States Circuit Court for the Southern District of New York, transferred to this court under the provisions of the act of Congress of August 5, 1909.

The goods involved were appliquéed articles coming under the provisions of paragraph 402 of the act of 1909, the pertinent provisions of which read as follows:

\* \* \* articles \* \* \* appliquéed \* \* \* ; all of the foregoing composed of silk, or of silk and metal, or of which silk is the component material of chief value, \* \* \* not specially provided for in this section, \* \* \* sixty per centum ad valorem; \* \* \* *Provided further*, That tamboured, embroidered, or appliquéed articles or fabrics shall pay no less rate of duty than that imposed upon the material if not so tamboured, embroidered, or appliquéed.

The collector, in fixing the duty upon the importation, relied upon paragraph 399, which fixes a specific duty upon silks by the pound, depending upon the weight, as follows:

Woven fabrics in the piece, composed wholly or in chief value of silk, not specially provided for in this section, weighing not more than one-third of one ounce per square yard, four dollars per pound; weighing more than one-third of one ounce, but not more than two-thirds of one ounce per square yard, if in the gum, three dollars per pound; if ungummed, wholly or in part, three dollars and twenty-five cents per pound, \* \* \*

with a further clause that in no case shall any goods enumerated in this paragraph, including such as have india rubber as a component material, be assessed at a less rate of duty than 45 per cent ad valorem. The collector fixed the duty by the specific pound rate provided for

<sup>1</sup> Reported in T. D. 31355 (20 Treas. Dec., 415).

in this section, having ascertained that, as weighed up, including the appliqué, the duty on the imported article under paragraph 399 by the pound rate would be greater than 60 per cent.

On appeal to the Board of General Appraisers the decision of the collector was modified, the board holding that the proviso to paragraph 402 contemplates that the article or fabric imported shall bear no less rate of duty than the material itself would have borne as material stripped of the appliqué had it been so imported.

Counsel for the Government states:

The importer claims that in arriving at the *rate of duty* the weight of the material without the appliqué should be used, thus bringing the classification under that clause of paragraph 399 reading "weighing not more than one-third of one ounce per square yard, four dollars per pound." With this method of obtaining the *rate of duty* we are in accord. But having classified the article and thus obtained the rate of duty, the importer insists that the *amount of duty* should be ascertained by multiplying the rate (\$4.00 per pound) by the weight of the material without the appliquéed metal or paste (i. e., 1.89 pounds). To this latter method of computation we object. We claim that the proper method is to follow the rule laid down in paragraph 404, and multiply the rate of duty (\$4.00 per pound) by the weight of the goods which were actually imported, to wit, 11.397 pounds.

Paragraph 404 thus referred to reads as follows:

In ascertaining the weight of silk under the provisions of this schedule, either in the threads, yarns, or fabrics, the weight shall be taken in the condition in which found in the goods, without deductions therefrom for any dye, coloring matter, or other foreign substance or material. \* \* \*

In the case of *Moore & Co. v. United States*, *supra*, p. 115 (T. D. 31117), we held that the valuation of an importation should be based upon its condition at the date of its importation, and that a valuation based upon some other or different condition is so at variance with the provisions of the administrative act and the custom and practice as to be permissible only when provided for or indicated in clear language. It will be noted that in the present case both counsel agree that the language of this act makes reference to section 399, and an investigation of what the tariff rate would be under that provision upon the goods in a different condition from that in which it is imported is necessary. We think this construction of this provision is correct, and that by no other means can it be ascertained what would be the rate of duty on these goods had they not been appliquéed.

This leads to the question of what is the meaning of the term employed in the act, "rate of duty." Counsel for the Government lays emphasis upon this phrase, and the contention is made that having ascertained specifically the rate which the material would have paid by the pound if not appliquéed, the only duty of the collector would be to multiply the rate by the number of pounds and ascertain the duty.

We think that such is not the intent of the act. Paragraph 402 runs all through an ad valorem rate, and when in the proviso Congress

speaks of a rate of duty and provides that such rate of duty shall be not less than that imposed upon the material if not so tamboured, embroidered, or appliquéed, it would be a stretch, as we think, to assume that they were departing in the use of this expression, "rate of duty," from the ad valorem rate as provided in paragraph 402 and transporting bodily the goods and placing them under paragraph 399, which fixes a specific tax dependent not upon value. The only purpose of this proviso is to make certain that the 60 per cent rate fixed by the paragraph shall in no case be a less rate than that imposed upon the material if not so tamboured, embroidered, or appliquéed. Assuming that for the purpose of ascertaining this rate of duty the goods must be treated and weighed up without the appliqué to ascertain under what part of paragraph 399 they would fall, it would seem that the material thus prepared is that upon which the calculation must be based to ascertain what the rate of duty upon the goods is as fixed by that paragraph. This was the view which was taken by the Board of General Appraisers.

The history of this provision tends to support this view. This proviso to paragraph 402 was incorporated in the tariff act for the first time in 1909. The tariff act of 1897, paragraph 390, levied a duty of 60 per cent ad valorem on silk articles appliquéed. Under this act woven silk fabrics which had been appliquéed in such a manner that the appliqué might be easily removed after importation, the fabric being more valuable without the appliqué, were classified as appliquéed articles and admitted to the commerce of the country at a lower rate of duty than was assessed on the fabric without the appliqué. See *United States v. Vantine* (166 Fed. Rep., 735). As was well said by the board in their decision in this case:

It is but a logical inference that Congress, while not intending to increase the rate of duty on appliquéed articles, sought, by enacting the proviso to paragraph 402, to meet the court decisions which we have cited, and thus prevent the importation of an appliquéed fabric or article at a less rate of duty than that levied on the fabric or article not so appliquéed.

It is obvious that this purpose of Congress is fully met by ascertaining what would be the rate of duty on the article without the appliqué, but if it is found to be less than the rate fixed by paragraph 402 the revenues have suffered no loss by the article being appliquéed. If the view contended for by counsel for the Government should be adopted, the result would be as indicated by the table following.

Weight of fabric.	Rate of duty.	Amount of duty.	Ad valorem equivalent per cent.
Weight of fabric appliquéed, over 1 ounce and not more than 1½ ounces per square yard (total weight of 122.30 meters is kilos 5.170, or 11.397 pounds), at.....	\$3.10	\$35.83	166
Weight of fabric not appliquéed, under one-third of an ounce per square yard (total weight of 122.30 meters, at 7 grams per meter, is 1.89 pounds), at.....	4.00	7.56	35
At minimum rate (par. 399).....	45 p. ct.	9.58	45
Value of 122.30 meters of fabric appliquéed is \$21.28, at.....	60 p. ct.	12.77	60

It will be seen therefore that appliquéed goods of the character of those in suit would pay an ad valorem tax of 166 per cent instead of a rate of 60 per cent as provided by the paragraph itself. To ascribe such a purpose to Congress would be to infer that it was designed to exclude from the commerce of the country goods of this character, for the rate would be practically prohibitive, as we may fairly assume. But we think it clear that the imposition intended was the ad valorem rate provided in section 402, and that the only purpose of comparison with paragraph 399 was to enable the collector to determine that the tax which would be levied under paragraph 399 does not in its aggregate as imposed upon the material, stripped of the appliqué, exceed the imposition resulting from the rate of 60 per cent ad valorem, which was the rate in the contemplation of Congress and fixed by section 402 as a standard.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, concurs in the result.

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UNITED STATES *v.* MORRIS EUROPEAN & AMERICAN EXPRESS CO.  
(No. 242).<sup>1</sup>

SPARK PLUGS OF AN UNDECORATED PORCELAIN-LIKE EARTHEN OR STONE SUBSTANCE.

A substance made of waste melilite or lava that has been pulverized, and after an addition made of oxide of magnesia and alkalies has been molded in the fashion of porcelain and then fired, was for dutiable purposes properly within paragraph 96, tariff act of 1897; and from the evidence submitted and from an inspection of the substance itself, it appearing to be susceptible of decoration, it was rightly assessed by the collector under paragraph 96 of that act.

United States Court of Customs Appeals, February 27, 1911.

APPEAL from decision of Board of United States General Appraisers, Abstract 23261 (T. D. 30601).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

*Joseph G. Kammerlohr* and *John Gibbon Duffy* for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Spark plugs for automobiles made of an unusual material imported from Germany were assessed for duty by the collector of customs at the port of New York at the rate of 55 per cent ad valorem as "insulators of porcelain undecorated" under the provisions of paragraph 96 of the tariff act of 1897, which provides that rate of duty in the following language:

96. All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if painted,

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<sup>1</sup> Reported in T. D. 31356 (20 Treas. Dec., 418).



tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem.

The importers made claim under paragraph 97 of the act, which is in the following language:

97. Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem.

They also alleged in some of their protests a claim under section 6 of the act that the merchandise was properly dutiable as a non-enumerated manufactured article at the rate of 20 per cent ad valorem.

The Board of General Appraisers sustained the contention of the importer in those protests where the claim was made that the articles were nonenumerated manufactured articles and overruled the protests in all cases where such claim was not made.

The board based its decision upon the finding that the articles were not susceptible of decoration, and on the authority of *United States v. Downing* (201 U. S., 354), reached the conclusion stated.

There seems to be sufficient testimony in the record to identify the character of the merchandise, at least so far as may be necessary for the purpose of this decision. Under the provisions of paragraph 96 the chief component material required may be that of an earthen or stone substance.

Witnesses who were engaged in the importation of the article and who by visits to Germany, whence they were imported, had acquired a knowledge of the production and of the component materials of the article, testified that it was made of mellilite or lava mined in certain regions of Germany. The material is taken from the mines in blocks, and, so far as this record discloses, is in a great measure used in the manufacture of lava gas tips. An illustrative sample was introduced of a gas tip cut from the original substance. It is of a honey color. Mellilite or melilite, which are the same, are stated by Dana in his *Text-Book of Mineralogy* to be a component of certain igneous rocks formed from magmas very low in silica, rather deficient in alkalis, and containing considerable lime and alumina; that it is of yellow and brownish colors, and found, among other places, in Wurtemberg, Germany; that it is named from the Greek word meaning "honey" in allusion to the color.

The precise article imported seems to have been made from the waste produced in the manufacture from the original substance of other articles. This waste is pulverized by mechanical methods, and to it is added oxide of magnesia and some alkalis. It is then subjected to a turning or molding process, much in the same manner as porcelain is made, and subsequently fired. By reason of its possess-

ing a higher power of resistance than porcelain it is used in the manufacture of spark insulators.

The official sample presents a divided superficial area. Each part presents a superficial area of at least  $1\frac{1}{4}$  square inches, a total of 3 square inches. There is stamped upon a part of the official sample the name of the manufacturer and a designation of the article in plain letters.

The material obviously being within the subject of paragraph 96, the only issue in the case is whether, or not, the article as imported is susceptible of decoration.

Several witnesses testified upon this point at the hearing, as well as to the method of manufacture, which also bears upon its susceptibility to decoration. The method of manufacture is similar to that of porcelain ware. It is undisputed in the record that the article in some instances is glazed. An illustrative sample that is glazed in a single color accompanies the record. There is an abundance of testimony in the record which is corroborated by a casual look at the sample itself, that it could be glazed in numerous colors. It also appears by the record that it might be subjected to decalcomania processes in the course of manufacture. That it or either part of it could be "painted, tinted, stained, enameled, printed, or gilded," all of which are enumerated by the act itself as methods of decoration or ornamentation of such wares, is conclusively shown by the fact that as imported the goods are printed or stamped in plain letters setting forth the name of the manufacturer and class of the articles. It is perfectly obvious that no greater space or other surface would be required to indulge fancy letters or ornamental design so as to come fully within the requirements of the statute as "decorated or ornamented." So glazing in two or more colors has uniformly been held an ornamentation.

The precise statements of the witnesses on this point are reassuring.

Mr. Gustave L. Herz, on behalf of the importers, testified:

Q. In answer to the question by the Government counsel you said they were not susceptible of decoration. What did you mean by susceptible of decoration?—A.

\* \* \* You can glaze this material; that is done right along. This part here, it is glazed; it can be lithographed. \* \* \*

\* \* \*  
Q. Is it glazed any color?—A. It is in red, brown, blue.

\* \* \*  
Q. Have you ever seen any of these articles imported similar to the one under consideration that was decorated with different colors?—A. I do not remember that. If you mean a stripe or a little thin line on top of it, I think that has been done.

Mr. Moritz Kirchberger, on behalf of the importers, testified:

Q. You have heard the testimony of the previous witness that it is possible to glaze insulators of this kind?—A. Yes, sir.

Q. Have you a sample that shows such glaze?—A. This is a sample of glazed insulator that I myself once upon a time imported.

Q. Made from the same substance?—A. Made from the same substance.

Mr. Herbert Sinclair, an importer of porcelain spark plugs, called by the Government, answered as follows:

Q. Do you ever decorate these? (Referring to spark plugs manufactured by the firm with which Mr. Sinclair is connected.)—A. We put their name on them; that is the only thing we do with them.

Q. Is that the only ornamentation or decoration that you put on there?—A. Yes, sir.

\* \* \* \* \*

Q. Is that glazed?—A. Yes; part of it is glazed.

Q. Glazed by heat, is it?—A. Yes, sir.

Q. Colored glaze as well as white glaze could be put on it?—A. Yes, could be put on.

Mr. Jacob Ritschy, called on behalf of the Government, testified:

Q. Do you ever decorate those things—the spark plugs?—A. Put the name on like it is on here now.

Q. Do you put any further decoration than what appears on here?—A. No, sir.

Q. Have you ever known spark plugs to be ornamented or decorated other than with a trade-mark?—A. I have not.

Mr. William Burgess testified that he had never seen a spark plug decorated, but after having his attention called to a porcelain one known as Exhibit X said:

That is a porcelain spark plug, partly glazed and partly unglazed.

These were all the witnesses called at the hearing and is the gist of their testimony upon the subject as to whether or not the article is susceptible of being decorated.

C. A. Janvier, in the work upon Practical Ceramics for Students, in speaking of decoration in general, states:

The decoration may be effected by applying plain or colored ornaments in relief, or by stamping, inlaying, or incising, and may be either glazed or unglazed. These methods have been used by nearly all nations, and from the earliest times. \* \* \* When actual colors are not used, light and dark tints or shades are employed, so as to give play and variety to the surface.

Apart from the weight of evidence brought to us to establish that the imported article is susceptible of decoration, it appears to us that the method of manufacture of the article itself, taking into consideration the various methods of decorating such materials, presents a superficial area of  $3\frac{1}{2}$  inches unquestionably susceptible of decoration. Even were it a necessary limitation to come within purview of the paragraph that the susceptibility to decoration should be a commercial probability, that element is not here absent. There plainly is exposed surface when the article is in use which in any high-class machine, if not in others, would be finished in keeping with the detail finish of the machine. Witness the illustrative samples here are glazed, some in whole and others in part, while in some the printing thereon is done in fancy letters, all of which evidences a demand for a commercial condition pleasing to the eye—one of which may easily be ornamentation. To hold that the superficial area of the quality

and size presented by this article, made of a material and in a method by which innumerable articles are made and decorated in porcelain, earthenware, and other materials similar to this, is to ignore not only the processes of the day but that of centuries past, wherein porcelain and other similar medallions, cameos, stained and otherwise ornamented stones, and other numerous artistic and valuable porcelain and stone productions of much less superficial area than is here presented by either part of the imported article were by their decoration made not only more valuable and ornamental but historically remarkable.

The court is of the opinion that the articles in question, as imported, were susceptible of decoration and properly assessed by the collector.

*Reversed.*

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UNITED STATES *v.* ROSENSTEIN (No. 394).<sup>1</sup>

1. FINDING OF FACTS BY THE COURT, WHEN.

Where there has been no authoritative finding of fact concurred in by a majority of the sitting members of the Board of General Appraisers, the question of fact is deemed open for determination here.

2. KIPPERED HERRING IN TIN CANS.

The words "herrings, kippered," in paragraph 272, tariff act of 1909, are construed with reference to the commercial meaning of those words at the time of the statute's enactment, and while it would appear there may have been occasional importations of kippered herring not in tins, the decided preponderance of the testimony here is that kippered herring are commonly imported in tins and can only be so imported during all seasons of the year, and "herrings, kippered," must be taken to refer to the fish in tin containers, and as such these are dutiable under paragraph 272 of said act.

United States Court of Customs Appeals, February 27, 1911.

APPEAL from decision of Board of United States General Appraisers, G. A. 7070 (T. D. 30794).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*McLaughlin, Russell, Coe & Sprague* (*Edward P. Sharretts, Rufus W. Sprague, jr.*, of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case involves an importation of kippered herring in tin cans. The Board of General Appraisers held the importation dutiable under paragraph 272 of the tariff act of 1909, which reads as follows:

Herrings, pickled or salted, smoked or kippered, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound; eels and smelts, fresh or frozen, three-fourths of one cent per pound.

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<sup>1</sup> Reported in T. D. 31357 (20 Treas. Dec., 422).

The Government claims that they are dutiable under paragraph 270, which, after providing for fish packed in oil, etc., reads:

All other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages, containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; caviar, and other preserved roe of fish, thirty per centum ad valorem.

Under prior tariff laws containing language somewhat similar to that employed in section 272, but not including the word "kippered," it was held in *Johnson's case* (56 Fed. Rep., 822), *Kauffmann Bros. v. United States* (99 Fed. Rep., 430), and in *Benson v. United States* (159 Fed. Rep., 118) that the term "fish in tin packages" more specifically described kippered herring than did the language then contained in the paragraph corresponding to 272.

The question first arose under the present statute in *Vandegrift's case*, G. A. 7007 (T. D. 30528). The Board of General Appraisers in that case held that the questions of law or fact were not identical with those passed upon in the cases above cited; that it was shown by the facts of that case and found as a fact that kippered herrings are not imported in any other way than packed in tins. In view of this it was held that the intent of Congress was clear, and that by the introduction of the words "kippered herring" it must be understood that Congress intended to refer to kippered herring in tins, and that this specific *eo nomine* provision should prevail over the provision for other fish in tins, as to adopt any other construction would render the provision for kippered herring a practical nullity.

The Government, being dissatisfied with this decision, prepared the present case, with the result that upon a hearing General Appraiser Chamberlain found that, as in the case of *Vandegrift's case*, it appeared that kippered herrings are not commercially imported except in tin cans, therefore the reasoning of that opinion should apply to this. General Appraiser McClelland, while neither affirming nor disaffirming this finding, agreed with his associate upon the ground that "herrings, smoked or kippered," appearing in paragraph 272, is more specific than paragraph 270, "all other fish in tin packages."

From this decision of the board the Government appeals. As there is no authoritative finding concurred in by a majority of the sitting members of the board, the question of fact is open for our determination here.

It becomes necessary for us to determine, therefore, whether kippered herrings were commercially imported in other than tin cans at the time of the enactment of the tariff act of 1909. We apprehend that the question to be decided is not whether an occasional importation might have been made in a fugitive way or under exceptional and

peculiar conditions, but whether in the ordinary course of the wholesale trade kippered herrings in other than tin boxes could be and were imported.

The testimony on the part of the Government's witnesses will be briefly referred to. The first witness mentioned in the brief of the Government is William H. White, who was a dealer in poultry and game, and who testified that since the previous fall he had imported kippered herring. It appeared that he had only been dealing in kippered herring since the previous fall, his testimony having been taken in April, 1910, and that the herring imported were similar to Scotch herring, and were imported dry.

The next witness, Thomas Smith, testified that he had himself prepared kippered herring in this country, and when asked if he had imported kippered herring, replied:

Well, I can't say that I have, but they are imported.

He further testified that they are imported in boxes containing 45 to 50 in a box, and were sold to the trade in general. His information as to these fish being imported was that he secured them from a dock.

The next witness was John J. Page, who testified that he had imported kippered herring, but when asked what part of his business it was, testified that his business was mainly that of dealing in fresh fish; that his imported fish consisted of about 5 per cent of his business. When asked what proportion of this 5 per cent consisted of herrings, he replied that not over 1 or 2 per cent. This, it will be seen, is a very small percentage of the business transacted by this dealer. He also testified that he only imported them during the cool weather:

We probably begin in October, and we wind up about the end of April.

It further appeared that these fish were sold by him as smoked herring. He testified as follows:

Q. And those fish which you have referred to as the kippered herring are really a variety of smoked herring?—A. A smoked herring; that is what we call them.

Q. Do you sell them as smoked herring?—A. Sell them as kippers or kippered herring.

Q. Do you sell them as smoked herring?—A. If a man comes in and says he wants a smoked herring we give him these. \* \* \* I would call it a smoked herring or kippered herring, either one.

It is not altogether clear from this testimony as to whether the importations made by this witness were, in the proper sense of the term, kippered herring. The testimony showed that a kippered herring is one salted and smoked only for a short time, about 20 hours. It is obvious that a herring may be so smoked as to make it capable of being shipped at any season of the year.

The testimony of L. H. Smith is somewhat similar.

It is to be noted that none of these witnesses dealt in kippered herring in large quantities. It is also noticeable that by the testimony offered by the Government it appears that kippered herring were not imported except during certain seasons of the year.

As opposed to this testimony there is the testimony of the importers' witnesses, who testified as to experiments in introducing kippered herring which have failed. Mr. Goldmark, who is a member of the importing firm, testified to having attempted to introduce kippered herring in boxes, and that a trial shipment of 50 boxes was brought in, was put in the refrigerator of the steamship, but notwithstanding this it was an unsuccessful experiment. He also describes the process by which the fish are prepared in Scotland. The witness said that they are split, the entrails removed, and the fish hung up in wooden houses and smoked lightly for about 20 hours; that they are then taken down, put in tins and hermetically sealed; that for consumption they are not put up in tins, but in boxes, and that none of these herring in boxes are exported to the United States; and that he would be very much surprised to know that any such were imported.

George H. Pearson, another importer called by the contestant, described the process of preparing kippered herring for market, and testified that in his opinion kippered herring could not be imported commercially except in tin cans. He answered the question: "Do you mean that it would not be practical or profitable to import them in any other way?" by saying: "I mean the method of curing the kippered herring is such that they are practically and positively a perishable article."

He testified that he had seen some herring that were brought here in boxes a long time ago and that the effort to bring them was a total failure, simply because the herring were perishable, and that therefore it was never considered practicable, commercially. Those herrings were brought here in a freezer as an experiment.

Seymour S. Mack, another witness for the importers, testified that the kippered herring imported by their firm was herring split and smoked, packed in a tin and hermetically sealed. He also testified, on cross-examination, that when engaged with another firm of Austin, Nichols & Co. an attempt was made to import 10 boxes of kippered herring, but when they arrived they were spoiled, and that was the first and last importation of them.

B. M. Shipman, a witness on behalf of the importers, testified that he was engaged as an importer of salt, canned, and dried fish, and was asked whether he had ever imported kippered herring in any way other than in tins. He replied that he had made several importations; that four years ago was his first one and February, 1910, was his last one; that these were very small and were in wooden boxes. When asked if he found it was commercially practicable to import them that way,

he answered that he did not. He found it absolutely impossible to import kippered herring and bring them in successfully unless they were embalmed. He further testified that in 1905 he brought over one box, but it was commercially a failure. It was absolutely slimy in 48 hours. The next importation he brought in a refrigerator, 100 boxes. In answer to the question whether that was commercially a success, he replied:

No; they were absolutely gone when I took delivery of them again—slimed, you know.

The next was an importation from Halifax, Nova Scotia, September, 1909, just after the tariff bill was passed. He then imported four or five boxes. He saw these boxes packed in Halifax, and when they arrived in New York they were slimy again. When asked if he could bring them in in wholesale quantities in a refrigerator, he answered:

No, sir; I will never bring in another one in any quantity or in any shape. I think it is impossible to do it unless you embalm them or dip them in boracic acid, which the Government I don't think would allow. The fresh fish, a kipper is a kipper; if it is heavy enough salted to be a bloater it will keep, but never as a kipper, because that is practically a fresh herring.

Q. The kippered herring, then, have less salt?—A. It is only washed in salt about five minutes to dry the blood out and cleanse it and give it a salt flavor.

In answer to the question, "How does that compare with the amount of salt used on the herring packed in boxes?" he replied, "That is a fish cured in salt."

This testimony is corroborated by Thomas Robertson, another importer, who testified to the effect that it is commercially impracticable to import kippered herring in boxes.

It is not altogether clear from the record that some of the Government's witnesses have not confused smoked herring with kippered herring. But however this may be, we think that the great preponderance of the testimony in this record shows that while occasional importations of so-called kippered herring in packages other than in tins have been made, the merchandise being sold for immediate consumption, to only certain classes of trade partaking more of the nature of retail transactions, importations of kippered herring in boxes is not commercially possible in the wholesale way, and that fugitive or occasional importations, confined to a particular season of the year, and in a small way, do not determine the commercial designation. See *Sonn v. Magone* (159 U. S., 417); *Stewart v. United States* (113 Fed. Rep., 928); *Morrison v. Muller* (37 Fed. Rep., 82); *Dieckerhoff v. Robertson* (44 Fed. Rep., 160); and *Lamb v. Robertson* (38 Fed. Rep., 716).

The decision of the Board of General Appraisers is *affirmed*.



UNITED STATES *v.* MATAGRIN (No. 54).<sup>1</sup>

## 1. STATUTORY CONSTRUCTION.

An importer is entitled to the benefit of the rule that revenue laws imposing taxes and like burdens should receive a reasonably strict construction.

## 2. SAME—A PROVISIO.

Unless the intent of the Congress is manifest that a proviso to a paragraph was meant to have a larger scope than the paragraph itself, and so to include something more within its operation, a recognized rule is to be applied and the proviso is to be construed with reference to the subject matter of the paragraph to which it is appended.

## 3. SAME—A NEGATIVE.

A negative may have, if the legislative intent is clear, the force of an affirmative; but a negative will not be given the force of an affirmative if there be a different field for its operation where, unless this negative should be treated as a negative proper, another provision of the same statute would be thereby modified or destroyed.

## 4. SAME—PROVISIO TO PARAGRAPH 195 AND SUBSECTION 18 OF SECTION 28, TARIFF ACT OF 1909.

The proviso to paragraph 195, tariff act of 1909, is perhaps broader than it was necessary to make it, but it is apt nevertheless, and it is held to have been intended, to save for operation subsection 18 of section 28 of that act making dutiable other containers than those enumerated in paragraph 195.

## 5. PARAGRAPH 195, TARIFF ACT OF 1909, AND ITS LAST PROVISIO.

The clause "shall not be dutiable unless their contents are dutiable" in a proviso to paragraph 195, tariff act of 1909, does not affirmatively or otherwise impose any duties.

United States Court of Customs Appeals, March 13, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 7015 (T. D. 30571).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

*Brooks & Brooks* for the appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation consisted of paper boxes containing leather gloves. The gloves were assessed at specific rates of duty by the dozen pairs, and the boxes were assessed at 45 per cent ad valorem as paper boxes under paragraph 418 of the tariff act of 1909, under a construction of the Treasury Department first promulgated in T. D. 29963 and reaffirmed in T. D. 30046, which construed the last proviso of section 195 as intending to impose a duty upon containers of the character here involved. The board held these containers not to be dutiable, and from this decision the Government appeals.

<sup>1</sup> Reported in T. D. 31406 (20 Treas. Dec., 487).

The two paragraphs in question are as follows :

418. All boxes made wholly or in chief value of paper or papier-maché, if covered with surface-coated paper, forty-five per centum ad valorem:

195. Cans, boxes, packages, and other containers of all kinds (except such as are hermetically sealed by soldering or otherwise), composed wholly or in chief value of metal lacquered or printed by any process of lithography whatever, if filled or unfilled, and whether their contents be dutiable or free, four cents per pound and thirty-five per centum ad valorem: *Provided*, That none of the foregoing articles shall pay a less rate of duty than fifty-five per centum ad valorem; but no cans, boxes, packages, or containers of any kind, of the capacity of five pounds or under, subject to duty under this paragraph, shall pay less duty than if the same were imported empty; and the dutiable value of the same shall include all packing charges, cartons, wrappings, envelopes, and printed matter accompanying them when such cans, boxes, packages, or containers are imported wholly or partly filled with merchandise exempt from duty (except liquids and merchandise commercially known as drugs) and which is commonly dealt in at wholesale in the country of original exportation in bulk or in packages exceeding five pounds in capacity: *Provided further*, That paper, cardboard or pasteboard wrappings or containers that are made and used only for the purpose of holding or containing the article with which they are filled, and after such use are mere waste material, shall not be dutiable unless their contents are dutiable.

Under previous tariff acts the coverings of specific duty goods or of free goods have for many years been admitted free. This holding has not been based upon express declaration of exemption, but has rested upon the view that usual coverings can not be brought within the general language imposing a duty on like articles without reference to their uses, but that direct language is required to bring them within the dutiable class. The rule was established by the case of *Karthaus v. Frick* (Fed. Cas., 7615), and has been frequently reaffirmed. *United States v. Leggett* (66 Fed. Rep., 300).

It is conceded, therefore, by the Government that unless there be found language in the statute which in terms imposes a duty upon these goods as coverings, the ruling of the court below was correct. It is further conceded by the Government that all of section 195 preceding the last proviso relates to metal coverings and their wrappings, so that if a duty is imposed by this statute upon the coverings here in question, it must be held to be imposed under the terms of the last proviso.

The general rule of statutory construction that a proviso is to be construed with reference to the subject matter of the paragraph to which it is appended is recognized by counsel for Government, but it is pointed out that this rule is not one of universal application and that there cases in which a proviso may be treated as a substantive enactment extending beyond the particular paragraph in which it is placed, and this contention is supported by abundant authority. *United States v. Whitridge* (197 U. S., 135); *Banking Co. v. Smith* (128 U. S., 174); *Lai Ming v. United States*, *supra*, p. 5 (T. D. 30770).

It is a rule, however, which is not to be ignored in the construction of statutes, and unless the intent of Congress is made manifest that the proviso was designed to have a larger scope, it should be restricted to the construction as indicated by the rule, that a proviso is generally

to be construed with reference to the immediately preceding clause to which it is appended, and as intended to restrict or qualify that clause, to exclude some possible ground of misinterpretation of what precedes it, and not to confer a power or enlarge the enactment to which it is appended. (Endlich on Interpretation of Statutes, sec. 186; 26 Am. and Eng. Enc. of Law, p. 678.)

A further difficulty is encountered in that the language of the proviso relied upon by Government is negative. But it is contended by Government that where the intent is clear the fact that the language employed is negative in its terms furnishes no obstacle to a court carrying into effect the intent of Congress. The rule is invoked that all words of the statute are to be given effect if possible, and authorities are cited to sustain the proposition that negative words may, if the intent is clear, be given the effect of an affirmative enactment, as in the case of *Manning v. Keenan* (73 New York, 45). (See also Lewis's *Sutherland, Statutory Construction*, vol. 2, sec. 332, p. 637.)

It is true that the authorities cited hold that where the intent is clear negative words may be given the force of affirmative enactment. We think, however, that it is not too narrow a construction of this rule to hold that the negative language will not be given such effect if it can be given force, as saving from the operation of what precedes such negative language, an enactment which would but for its use be abrogated or modified.

The question to be determined is whether Congress has made it clear by the language employed that the purpose was to make dutiable containers of the character described. It is not contended that section 418, being general in its terms, should of itself be construed to include containers of dutiable or nondutiable articles. So that reliance must be had and is had exclusively upon the last proviso of section 195, and it is perfectly clear that the containers in question come within the express provision rendering them nondutiable unless the interpretation placed upon the last clause, namely, "unless their contents are dutiable," is that this language manifests an intent to make dutiable what is not by other terms of the act made dutiable. To state the proposition in another way: If these words can be given no office except that of declaring dutiable containers of specific goods, then the result claimed by Government's counsel would seem to follow.

Turning to subsection 18 of section 28 of the act we find it provided:

That whenever imported merchandise is subject to an ad valorem rate of duty  
 \* \* \* the duty shall be assessed upon the actual market value or wholesale price thereof \* \* \* including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids. \* \* \*

It is perfectly obvious that if the last clause of the proviso of paragraph 195 had been omitted this provision of subsection 18 of section

28 would have been modified to the extent of admitting free the character of containers specifically named in that proviso, although they were containers of ad valorem goods. It was then essential that some language should be employed which should prevent this operation, if such was not the intent. While the language employed is perhaps broader than might have been necessary, it is none the less apt, and by adding the words "unless their contents are dutiable" it saved from the free list the containers which are provided for by subdivision 18 of section 28.

We are unwilling to extend the rule that negative language such as that employed here may be held equivalent to affirmative language imposing a duty when, as in this case, the language employed has some office to perform in saving or protecting other provisions of the very statute under consideration, even though the language may be broader in its scope than was necessary to attain the purpose aimed at. The importer is entitled to the benefit of the rule that in construing revenue laws imposing taxes and like burdens, the statutes are to receive a reasonably strict construction. (36 Cyc., 1189; *United States v. Wigglesworth*, 2 Story, 369; and *Hartranft v. Wiegman*, 121 U. S., 609.)

We think the Board of General Appraisers reached the correct result, and their decision is *affirmed*.

SMITH, BARBER, DE VRIES, and MARTIN, Judges, concur.

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PACIFIC CREOSOTING CO. v. UNITED STATES (Nos. 120 and 121). COLMAN CO. v. UNITED STATES (No. 122).<sup>1</sup>

**METAL DRUMS CONTAINING CREOSOTE OIL.**

The inconvenience likely to follow a decision here will not be allowed to defeat the text and spirit of the law, nor will a previous illegal practice; and the Congress will not be presumed to have intended an importer could bring in free of duty durable metal drums of considerable value containing creosote oil, and mingle these drums when emptied of their contents with other articles of commerce in the trade of the United States; and such metal drum containers are dutiable under section 19 of customs administrative act of June 10, 1890.

United States Court of Customs Appeals, March 13, 1911.

APPEAL from decision of the Board of United States General Appraisers, Abstract 22760 (T. D. 30364).

[Affirmed.]

*George E. De Stieguer* for Pacific Creosoting Co.; *Ira Bronson* and *Trefethen & Grinstead* for J. M. Colman Co., appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

These are appeals from a decision of the Board of United States General Appraisers which affirmed the action of the collector of

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<sup>1</sup> Reported in T. D. 31407 (20 Treas. Dec., 490).

customs at the subport of Seattle, Wash., in assessing duty upon certain metal drums which contained creosote oil. The collector held that the drums were dutiable as manufactures of metal by virtue of that part of section 19 of the customs administrative act of June 10, 1890 (26 Stat., 131), which reads as follows:

If there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported.

There is no dispute as to the fact that creosote oil was free of duty under paragraph 524 of the tariff act of 1897, so that the question becomes this: Was the board correct in its decision that the metal drums used were dutiable as unusual containers for the creosote oil in them, and that they were designed for use otherwise than in the bona fide transportation of the oil to the United States?

Although there are conflicts in some parts of the evidence, nevertheless it is clearly established that prior to 1904 the usual way of bringing creosote oil to the United States was in barrels or tank steamers. Importations by such usual methods have been principally to Atlantic or Gulf points, whence rail shipments were made to the Pacific coast. It is true that between 1890 and 1904 there were several (about three) shipments in metal containers to San Francisco, one of the witnesses for the importers stating that certain metal tanks or coverings were imported to San Francisco with a view to finding what package could be best used and sold after use. Not until February, 1904, was the use of iron drums begun by importers who shipped from England to Seattle.

Iron drums were found to be desirable because they did not leak, and because vessels which would carry perishable freight or freight that might be injured by creosote would carry metal drums, but not barrels, containing creosote oil. But more to the point is the fact that the importers found it was profitable to use metal drums because a market for the drums was found, wherein after being emptied of their creosote oil contents, the drums could be sold advantageously. It appears as a fact from the importers' consular invoices, as well as by the weight of the evidence, that the average cost of the drums as purchased abroad was \$5.73 each, while the cost of the oil in each drum was but \$4.96. The drums were sold by the importers to the Standard and Union Oil Cos. of the Pacific coast, and by such purchasers used for the shipment of oil in their regular commercial oil business.

The custom of the purchasing oil companies was to mark each drum with a permanent brass plate, upon which was a serial number, so that the drum could be identified and traced. The drums were filled and refilled as commercial needs called for, and when sent out were

charged against customers as of a value of \$10 to \$12 each, payment of which was expected in case of failure to return the empty drum. It appears that the oil companies found it more economical to buy the imported package from the creosote oil importers than to have like drums made in the United States and shipped to the Pacific coast. After 1904 the importations of oil in barrels decreased in the Seattle district, while that of drums increased, as the subjoined table shows.

*Importations of creosote oil, district of Puget Sound, Oct. 1, 1902, to Dec. 31, 1908.*

Dates.	Imported in wooden barrels.	Imported in metal drums.
Oct. 1, 1902, to Dec. 31, 1902.....	42,000	.....
Jan. 1, 1903, to Dec. 31, 1903.....	131,393	.....
Jan. 1, 1904, to Dec. 31, 1904.....	146,570	1 291,140
Jan. 1, 1905, to June 30, 1907.....	711,950	751,000
July 1, 1907, to June 30, 1908.....	331,279	1,098,798
July 1, 1908, to Dec. 31, 1908.....	21,000	1,359,012
Total.....	1,384,192	3,499,950

<sup>1</sup> First importation in metal, 500 drums. (C. E. No. 3562, Feb., 1904.)

It also appears that in 1908, 8,438,660 gallons of creosote oil were imported into the United States, of which 8,173,712 gallons were brought in by tank steamers through New Orleans, 264,948 gallons by tank steamers through New York; that 2,964,487 gallons were imported into the United States in barrels; that 1,214,726 gallons were imported in iron drums, of which 1,098,798 gallons were entered at Puget Sound, Wash. To the importer doing business in the Puget Sound section of the country, leakage, whether in vessel or railway transportation, in handling creosote oil in barrels, is an item of importance, the loss by leakage being sometimes as high as 10 to 12 gallons a barrel, which amounts approximately to 55 cents a barrel.

Admitting the evidence of such decided losses to be accurate, a comparison of the value of two barrels, which is, say, \$2, which hold about the same quantity of oil that one drum does, with the cost of the drum at \$5.73, it is clear that the importers could only be made whole on the cost of the drum by selling it as an article of merchandise when brought into the United States. An effort was made by one witness for the importers to demonstrate that they lost money in using the drums. The unfavorable result was arrived at, however, by adding to the cost of each drum the cost of handling the same, plus 50 cents for transportation to Seattle. But the result so reached is not satisfactory when it is remembered that whether in barrels or drums the expense of handling must be considered and is about the same.

Then, if we eliminate that item and take the net invoice value of a drum at \$5.73 and add 50 cents for transportation from the importers' place of business into Seattle, we have \$6.23. Deducting from this amount the average selling price of a drum, \$5.50, we find that the

importer has paid 73 cents for the metal drum. With this showing it becomes hardly necessary to say that two barrels which would by the invoices in evidence cost approximately \$2 at the port of shipment, and which by the evidence can not be sold afterwards to hold oil products, and which must be treated as practically of no greater value than 50 cents each after use, will not permit of as much profit to the importer using the barrels with a loss of 55 cents leakage per barrel as would the metal drum with the ready sales market under the conditions already set forth.

It therefore seems only reasonable to say that, while of course the drum is the better container for the creosote oil, it not having been the usual one prior to 1904, the real fact would seem to be that it was only after it was found that such a container could be brought into the United States to be sold for a specific subsequent purpose that the use of such drums became common. Moved, evidently, by the fact that the drums could be sold to a commercial advantage, the design in the importation of such a container became a dual one—namely, to obtain a good oil container and to bring in a marketable article to be sold by the importers.

But we can not think that Congress, knowing when the tariff law was passed that creosote oil, which was admitted free of duty, was usually imported in tank steamers and barrels, intended that an importer could buy an expensive durable metal drum and thereafter sell the same to be mingled with the mass of things in commerce within the United States, yet escape payment of duty upon the drum merely because it was used for a time in the transportation of creosote oil.

Nor can the argument that for years the customs officers at Pacific coast ports failed to tax metal drums prevail, for the reason that under the evidence, as we read it, the practice of not assessing the duty upon metal drums such as are involved in the case under consideration was clearly illegal and therefore can not be sanctioned without positive violence to the law.

The inconvenience to follow a decision holding that the metal drums are dutiable may cause annoyance to some importers, but can not be allowed to defeat the text and spirit of the law. Tank steamers and barrels, having been the usual containers, must be resorted to unless the importers are willing to pay the duties incident to the use of metal drums which are dealt in as separate articles of commerce and which are themselves subject to a duty.

In *Martindale v. Cadwalader* (42 Fed. Rep., 403) the court, commenting upon the language of a statute of similar import to that under consideration, said:

\* \* \* It was intended not to exempt any part of the merchandise, anything that could be dealt in as merchandise, bought and sold, from duty, but to exempt simply the coverings, the means of securing safety in transportation; and if a party

in importing merchandise used a package or box or covering designed for some other use, as well as for the importation, and thus designed to evade the revenue laws of the United States, he should be subject to the high rate of duty on the box or covering provided for by this section. \* \* \*

The decision of the board is *affirmed*.

MONTGOWERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

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SHALLUS v. UNITED STATES (No. 230).<sup>1</sup>

1. TARE, GENERALLY.

The impurities ordinarily present in an article of merchandise do not constitute tare; and such impurities as are not commonly present in the merchandise as traded in are alone, for dutiable purposes, the subject of allowance.

2. TARE ON HIDES, SUFFICIENCY OF.

No rule can be laid down to determine the precise number of hides in a given importation that should properly be examined and tested in order to fix a just allowance for tare on an entire consignment; but in the case at bar, of the importations immediately involved, a fair number and selection of hides were examined and tested by an examiner and by the representatives of the importer, when ten out of 795, five at a time being selected at different stages of the count, and five out of 409, chosen from the other lots, had been so examined and tested. On the evidence, an allowance of two pounds per hide for tare would have been a proper allowance on these two consignments.

United States Court of Customs Appeals, March 13, 1911.

APPEAL from decision of the Board of United States General Appraisers, Abstract 23068 (T. D. 30547).

[Modified and affirmed.]

*Walter Evans Hampton* for the appellant.

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Frank H. Shallus, of Baltimore, Md., imported at that port in the latter part of 1908 and 1909, 1,001 bundles of hides weighing 58,571 pounds. The importations were made at different times by divers vessels. The hides were largely those of American cattle which had been shipped to England, there butchered, salt pickled, and returned to the United States. The protestant, who is appellant here, in due time protested against the amount of duty collected upon the hides, alleging that an insufficient allowance had been made by the collector in taring the hides for the adhering manure and salt and accumulated moisture. There was a total of 13 shipments.

There is no material conflict as to the facts. The testimony is confined in the main to two shipments. First, that by the *Quermore*, entered March 25, 1909, covered by protest 371110; and, secondly, by the *Ulstermore*, entered April 10, 1909, covered by protest 371111.

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<sup>1</sup> Reported in T. D. 31408 (20 Treas. Dec., 494).



The only evidence affecting the other shipments was that of the purchasing agent of the importer who stated he had seen about 2,000 of the hides in England in 1908. Testimony was offered on behalf of the importer by the same witness that he had examined hides of the same lot imported at Philadelphia but excluded by the Board of General Appraisers. It was admitted by the importer that the hides imported at Philadelphia were not of the shipments covered by these protests; and it does not satisfactorily appear in the record that the 2,000 hides seen by the witness many months before in England were positively a part and parcel of any of these importations.

At most, the evidence offered, together with that received, as to the importations other than those covered by the two protests noted, is so entirely remote that it can not be seriously contended that it in any wise establishes or even tends to establish the condition of the merchandise, the subjects of these 13 protests. It appears from the record that of the quantities of hides imported into this country but a minor part is the subject of tare, and of those the subject of tare, the amount of tare greatly varies. These conditions reduce the serious issues in the case to the shipment by the *Quernmore* covered by protest 371110, entered March 25, 1909, and that by the *Ulstermore*, covered by protest 371111, entered April 10, 1909.

The first shipment consisted of 795 hides. On arrival at the port of Baltimore the examiner started in to weigh the whole shipment. When he had weighed a hundred or so, 5 hides were weighed and laid aside. A little later 5 more were weighed and laid aside, all for test as to tare. The examiner, from weighing and inspecting the cargo, deemed these 10 hides sufficiently representative of the 795 to properly determine the tare.

The examiner testified that after weighing each he shook both sides of them out over a truck and again weighed them. The amount of tare recovered by him from the 10 hides was about 1 pound to the hide, or 10 pounds from the 10 hides. The identical 10 hides were then turned over to the representative of the importer who applied his test, which was much more vigorous in application. He proceeded to remove the manure from the hides, the hair side first, by a spade and box scraper. After apparently recovering all that could be gleaned by the use of the spade he then applied the box scraper. Afterwards he applied a broom, and then turned the hides over and proceeded on the skin side with a spade lightly and the broom. He removed particles of salt, manure, dirt, and some hair. This vigorous test, it would appear from the record, if applied in all cases might result in an injury to the hide. It resulted in reclaiming an additional quantity of 3.9 pounds of tare per hide after the examiner had applied his method to the identical hides.

It is pertinent to state that there is testimony in the record to the effect that the commercial test of taring is largely one of estimate applied

to each hide, and it is stated that the average tare is from 3 to 8 pounds of manure to a hide. The testimony further indicates that the tare of hides commercially is confined to the manure or dirt upon them.

On the next shipment, that by the *Ulstermore* April 10, 1909, covered by protest 371111 herein, consisted of two lots. Of the first lot of 409 bundles of hides, 5 were tested by the examiner as the Government test. The same 5 were tested by the importer's representatives. The Government tare was one-fifth of a pound per hide. The importer's representatives removed from them an additional quantity of  $4\frac{1}{2}$  pounds per hide.

The second lot of this shipment was 152 bundles of hides. Five were tested. The Government test consisted of two-fifths of a pound tare per hide, while the importer's representatives removed an additional quantity of seven-tenths of a pound, making a total of 1.1 pounds per hide, even under the vigorous test of the importer's representatives.

The Board of General Appraisers held that these tests were not sufficiently representative of total imports of about 16,000 hides and allowed the protests to the extent of the 10 hides actually tared in each case by both the Government and the importer and overruled the protests in all other particulars, as well as the other protests.

It further appears over objection in the record that in response to the request of the collector of customs at Baltimore written but two days after the entry of the cargo of April 10, 1909, the Treasury Department made an investigation at several ports of the methods of determining tare for manure adhering to hides that were imported, from which it determined that 2 pounds per bundle (hide) was a fair general average, and instructed the collector at the port of Baltimore to make such allowance in the future. If it were error to admit this statement it was error without prejudice.

In the case of *Seeberger v. Wright & Lawther Oil & Lead Manufacturing Co.* (157 U. S., 183) the principle as to when tare is allowable is stated in effect that tare should be allowed only in such cases where its presence was uncommon to the condition of the merchandise as ordinarily dealt in in trade and commerce. In other words, the ordinary impurities of merchandise do not constitute tare, but the extraordinary impurities, such as are uncommonly present in the merchandise as bought and sold in trade and commerce, are alone the subject of allowance for dutiable purposes.

It would seem from the testimony in this record and from the recognized practice of the customs officials that the presence of manure in imported hides is a condition uncommon in trade and commerce. Its presence, it appears from the record, is invariably the subject of negotiation in the trade and an allowance made therefor; the reason apparently being, as stated in this record, that "in a very large majority of importations the hides are found to be free from manure, and it is only in rare instances that the question of allowance for manure adhering ~~to the~~ hides is required to be met."

The number of hides which should be examined in the particular case to constitute a fair number upon which to base a practicable average would always be an indefinite question, depending in a great measure in each case upon the character of the property imported as to uniformity and possibly other particulars.

In *United States v. Thomas* (178 Fed. Rep., 602), the importation consisted of wool on the skin. Twenty thousand skins were imported; but eight out of the 20,000 were weighed by the examiner of wool at the port of Boston. It was contended by the Government that this was not a sufficient number from which to ascertain the amount of wool upon the skins. The court held otherwise. In the case at bar, as affects the importations by the *Quernmore* and the *Ulstermore*, it would hardly seem to lie with the Government to assert with reference to these two importations that an insufficient number of skins were taken for the purpose of the test, for the reason that the identical number of skins, in fact the identical skins, and those only, were used as a test by the Government examiner which were used as a test by the representatives of the importer. In the case of the *Quernmore* 10 skins out of 795 were examined, they having been selected by the examiner, after weighing the whole cargo, as representative of the cargo.

In the case of the *Ulstermore* 5 were selected as representative of the 409 skins, and 5 others as representative of the 152 skins, and the identical skins were subjected to the test adopted by the importer. The court is of the opinion that so far as these two cargoes were concerned, in view of this record, a fair number and selection of skins was adopted as a test. It is admitted on all sides that from the same skins where less than 1 pound was recovered by the Government examiner three or four times that amount was recovered by the importer's representatives from the *Quernmore* cargo and about twenty times as much from the 409 skins of the *Ulstermore* cargo and more than twice the quantity from the 152 skins of the *Ulstermore* cargo.

The issuable fact for determination, therefore, is the proper allowance for tare upon these cargoes. The facts from which this determination is to be had are meager and somewhat uncertain. There can be no question, however, that the importer was entitled to a greater allowance for tare than was allowed in the particular cases, and that this record fairly and satisfactorily establishes that fact. In the presence of a similar record, the Supreme Court of the United States in the case of the *United States v. Ranlett et al.* (172 U. S., 133), and where examination was impracticable, the goods having gone into commerce, epitomized the record in the following statement:

A reexamination *de novo* is now impracticable, but it appears to us that the evidence taken by the board affords an adequate basis for a conclusion. The examiner testified that he found "along about 80 to 86 per cent foreign make"; "in general from 75 to 80 per cent"; and that, in his judgment, there was no invoice "that would show over 25 per cent of American bags"; yet he also said that he could not give specific details of each invoice, and that he "supposed if 75 per cent of the bags in the bale were of foreign manufacture, it carried the whole of them."

The Supreme Court, after commenting upon the insufficient character of this evidence and the manifest purpose of the Government officials to faithfully perform their duties under difficult circumstances, stated:

\* \* \* We think it unnecessary to remand the cause for another hearing, and that the ends of justice will be best subserved by directing a decree for the refunding of one-fourth of the duties paid.

We are of the opinion that as to the 795 bundles, imported per *Quernmore*, and the 409 bundles, imported per *Ulstermore*, the importer was undoubtedly entitled to an allowance for tare of 2 pounds per hide, and such should be made. The evidence showing upon the samples examined of the 152 bundles that the allowance made by the collector was substantially correct, we are of the opinion that no further allowance should be here made as to these bundles.

The decision of the Board of General Appraisers will be accordingly modified, and, as so modified, *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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LUNHAM v. UNITED STATES (No. 271).<sup>1</sup>

1. REHEARING—LACK OF GROUND FOR MOTION.

In the absence of a statute regulating procedure on an application for a rehearing, failure of counsel sufficiently to present a cause affords ordinarily no ground on which such an application could be based.

2. SAME—GROUND FOR THE MOTION.

It does not appear in this case that the decision as rendered was in conflict with an express statute or with a controlling decision to which the attention of the court had not been directed.

United States Court of Customs Appeals, March 13, 1911.

APPLICATION for a rehearing (T. D. 31258).

[Motion denied.]

*Walter Evans Hampton* for the motion.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

PER CURIAM: The above-named appellants have filed their petition for rehearing substantially based upon the claim that the collector, by liquidating the entry before the term of the bond for the production of the certificate of previous exportation had expired, had impliedly waived the production of the certificate. This claim was not made in the brief or argument when the case was heard in this court, but it was claimed that by showing the impossibility of obtaining the same its production was, in law, excused.

Some stress seems to be given in the petition to the opening statement in the opinion on file in this case that the tabasco sauce in question was made in America and shipped from New Orleans to England. This must be considered in connection with the further statement

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<sup>1</sup> Reported in T. D. 31403; see also T. D. 31258 (20 Treas. Dec., 186, 498).

therein that we should so find if evidence legally competent to prove that fact was embodied in the record, and that we held that such evidence was not therein contained.

It is quite apparent from the record that the petitioners here, beginning with the hearing before the Board of General Appraisers, have all the time been charged with knowledge that it was contended by the Government that the production of the certificate of previous exportation was an indispensable prerequisite to entitle the petitioners to free entry of their importation.

It is unnecessary to enter into an elaborate discussion of the rules which, in the absence of a statute regulating procedure in such cases, are generally held to govern the granting a petition for reargument in appellate courts, except to say that failure of counsel to sufficiently present a cause for determination ordinarily furnishes no ground for a rehearing. It is also generally considered that a reargument will not be ordered upon a petition therefor, unless it appears that the decision as rendered is in conflict with an express statute or a controlling decision to which attention was not called when the case was first argued in the appellate tribunal, neither of which conditions are made to appear in the petition before us.

The result is that the petition for rehearing is *denied*.

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GROSS v. UNITED STATES (No. 451). HERSKOVITZ v. UNITED STATES (No. 452).<sup>1</sup>

1. GOOSE SKINS USED OTHERWISE THAN AS DOWN.

Paragraph 425, tariff act of 1897, making feathers and downs when dressed, colored, or otherwise advanced or manufactured in any manner dutiable at 50 per cent, does not extend to or include goose skins adapted to and employed for other purposes than those for which down is used.

2. SAME—WHEN USED AS FURS ARE USED.

The evidence showing that the use to which goose skins such as were here imported are ordinarily put is similar to the use of fur and not to that of down, they were dutiable by similitude under paragraph 426 of that act and according thus with a long-continued practice of the Treasury Department.

United States Court of Customs Appeals, March 13, 1911.

APPEAL from United States Circuit Court for Southern District of New York (T. D. 30122, T. D. 30806).

[Reversed.]

*Joseph G. Kammerlohr and John Giblon Duffy* for the appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These are appeals from the judgment of the United States Circuit Court for the Southern District of New York affirming the decision of the Board of United States General Appraisers.

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<sup>1</sup> Reported in T. D. 31410 (20 Treas. Dec., 499).

The merchandise which is the subject of the controversy consists of goose skins with the down on from which the feathers have been plucked, and which were assessed for duty by the collector of customs at 50 per cent ad valorem under paragraph 425 of the tariff act of 1897, which reads in part as follows:

Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this act, fifteen per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, including quilts of down and other manufactures of down, \* \* \* fifty per centum ad valorem.

It is contended that the merchandise is properly dutiable by similitude under paragraph 426 of said act, as follows:

Furs, dressed on the skin but not made up into articles, and furs not on the skin, prepared for hatters' use, including fur skins carroted, twenty per centum ad valorem.

Or under section 6 of said act as nonenumerated manufactured articles.

The Board of General Appraisers overruled the protest, and the Circuit Court for the Southern District of New York affirmed the decision of the board.

The circuit court and the Board of General Appraisers seem to have considered the fact that the down was on the skin did not prevent a classification of the importation as down. We are unable to concur in this holding. Under the first part of the paragraph, if we assume that a goose is a bird within the meaning of the language employed, then under the rule of *expressio unius est exclusio alterius* the importation in question would be excluded from the provision. "Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on," would exclude the skins of birds with the feathers removed. So reliance must be placed upon the words "feathers and downs of all kinds, \* \* \* crude or not dressed, colored, or otherwise advanced or manufactured in any way," and the provision that when dressed, colored, or otherwise advanced, including quilts of down and other manufactures of down, a higher rate of duty is fixed. Under the prior tariff law, by a decision of the Board of General Appraisers, G. A. 1434 (T. D. 12828), it was held of an importation precisely like that in question that it was not within the provision containing the same language as that employed here except for the words added in the law of 1909, "otherwise advanced in any manner." The question is whether by the introduction of these words these goose skins have been made dutiable.

We think not. All that appears to have been done to this merchandise is that the skins were dressed by having a leather dressing applied to them and the feathers cleaned but not colored.

We think that the intention of this provision was to limit it to feathers and downs except as provided in the first part of the paragraph by which the term "feathers and downs" was extended to include "bird skins or parts thereof with the feathers on;" that it was not intended otherwise to extend them to include birds or fowls, or goose skins adapted to and employed for other purposes than to be used as down; that the concluding portion of the section "when dressed or otherwise advanced in any manner" was intended to apply to down and not to an advance in the importation by making it something else than down and devoting it to another and distinct purpose.

The evidence clearly shows that the use to which this importation is put is similar to that of fur. It is almost exclusively sold by furriers and is not devoted to the ordinary uses to which down is devoted. By similitude it should be assessed under paragraph 426.

This ruling accords with the long-continued practice of the Treasury Department, as the evidence shows.

It results that the decisions of the court and of the Board of General Appraisers are *reversed*.

HUNT, SMITH, BARBER, and DE VRIES, Judges, concur.

#### UNITED STATES *v.* PERKINS (No. 155).<sup>1</sup>

##### 1. POWER OF BOARD OF APPRAISERS TO REVIEW FACTS.

The power of a Board of General Appraisers to review on appeal a finding of facts is not limited in its exercise to cases where new and additional facts or exhibits are there submitted, but embraces the case in its entirety, with or without new and additional facts or exhibits appearing; and so the finding of a collector is not conclusive against an importer when, on appeal to a Board of General Appraisers, precisely the same case is there presented for decision that was presented at the port of entry.

##### 2. GLOVES.

The Board of General Appraisers having found the gloves in this consignment were not embroidered with more than three single strands or cords, and the Government relying here solely on a contention that the board exceeded its authority in not adhering to a different finding by the collector, the board on the contrary possessing the authority so denied, its finding is affirmed.

United States Court of Customs Appeals, March 20, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22027 (T. D. 30086).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn* of counsel) for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

In August, 1908, Perkins, Van Bergen & Co., appellee here, imported certain gloves. The local appraiser returned them as women's

<sup>1</sup> Reported in T. D. 31430 (20 Treas. Dec., 529).

kid gloves under 14 inches, embroidered. Duty was assessed at the rate of \$3.40 per dozen pairs, under paragraphs 442 and 445 of the act of July 24, 1897. The report of the deputy appraiser, which appears in the record with the return of the appraiser, discloses that he advised 40 cents per dozen pairs additional duty because the gloves were embroidered with more than three single strands or cords, such additional duty being assessed under the above-cited paragraph 445, which imposes cumulative duties of 40 cents per dozen pairs "on all gloves stitched or embroidered with more than three single strands or cords."

The importers protested and sought a review upon the ground that the cumulative assessment was illegal, in that the gloves were not stitched or embroidered with more than three single strands or cords.

At the hearing had by the Board of General Appraisers no new evidence was introduced, the board having before it only the record and exhibits which the collector had had before him at the time of his action. The Board of General Appraisers, however, considered the case and sustained the protests of the importers and reversed the decision of the collector, the essence of their finding being stated in the following extract from the opinion by General Appraiser McClelland:

The cases are submitted for decision on the official samples. We are therefore without evidence as to what the embellishment shown on the gloves would be considered by those competent to express the opinion of the glove trade, but we are inclined to think, in view of past experiences, that any uniformity of understanding between makers and dealers in gloves as to the meaning of the tariff phrase "stitched or embroidered with more than three single strands or cords" is absolutely hopeless. There has also been apparent conflict in the decisions of the board and the decisions of the courts as to what constitutes stitching or embroidering with more than three single strands or cords, and manifestly this condition has resulted from the fact that the language quoted from paragraph 445 is not a trade phrase, or one that has any common understanding among glove men.

We are inclined to think, in view of the ruling of the court in *United States v. Tre-fousse* and *United States v. Passavant* (154 Fed. Rep., 1005; T. D. 28000) and *United States v. La Fetra* (172 Fed. Rep., 297; T. D. 29810), that the gloves in question should not have been assessed under paragraph 445, and therefore we sustain the protests and reverse the decisions of the collector accordingly.

The Government now prosecutes this appeal, contending that the decision of the board was erroneous for the reason that, having no additional evidence before it tending to overcome the action of the collector, the board was without authority to make findings and conclusions reversing those made by that official.

Reduced to closer application, the position of the learned counsel for the Government is: That this is a case where the facts upon which the appraiser and collector have acted are special in their character, not facts within common knowledge; that the findings of the collector are presumed to be correct, and that inasmuch as no additional evidence was introduced by the importers at the time of the submission



of the record before the Board of General Appraisers, it follows that the board could not apply its own observations or knowledge or opinions to the record and exhibits, but as a matter of law was so bound by the strength of the presumption in favor of the action of the collector that it could do nothing but affirm his classification and assessment.

We will gain light upon the merits of these contentions by examining into the powers conferred upon the Board of General Appraisers. Proceeding upon the recognized rule that, in the first place, the collector, aided by such administrative officers as the law provides he may call upon, is the officer to decide what rate and amount of duties are chargeable upon merchandise imported, Congress, in its wish to safeguard the rights of the importer, created the Board of General Appraisers as an appellate body with authority to review a case which had been acted upon by the collector. Power to examine into and decide the case upon the objections duly made by an aggrieved importer and "the invoice and all the papers and exhibits connected therewith" is the grant of jurisdictional authority to the board. The statute makes the method of appeal perfectly simple and direct. Transmission of the invoice papers and exhibits must be made by the collector to the reviewing body—the Board of General Appraisers. The board then examines and decides upon "the case" thus submitted, and its decision becomes final, subject to the right of appeal to the Court of Customs Appeals. Now, under this easy method, whereby the importer may seek a remedy against error on the part of the collector of customs, neither reason nor case prescribes that the Board of General Appraisers can effectively exercise its reviewing power only where the appellant introduces additional evidence to support his objections to the assessment made by the collector.

The general principles which underlie the whole law of appeals are counter to such a doctrine, in that the exercise of appellate jurisdiction depends upon no condition precedent whereby new evidence is heard before submission of the cause. An appellate tribunal to which a party who feels aggrieved may lawfully go says whether, upon the facts and the law as found and stated by the inferior court or deciding body or person, justice has been done. It is sometimes found that the reviewing tribunal has been clothed with authority to hear further evidence, by way of supplementing that in the record, and we do not mean to express doubt of the power of the Board of General Appraisers to hear expert witnesses in aid of the meaning of commercial terms, as used in tariff law, or in explanation of any matter of which judicial notice may not be had. *Krusi v. United States*, *supra*, p. 168 (T. D. 31213). But we are not concerned with that aspect of the law of appeals as applicable to the Board of General Appraisers, because, as we shall see, it is not directly relevant to the question under con-

sideration. At this moment it is enough to say that the right of appeal from a decision by a collector which is given to an importer carries with it the assurance that it will secure to him the judgment of the Board of General Appraisers upon the record transmitted. Such judgment, while subject always to such rules of law as may be pertinent to the general exercise of any appellate jurisdiction, must, nevertheless, be an independent one based upon the record as presented and not one ordered because of a refusal to consider the evidence. Any other construction of the statute which would circumscribe and curtail the scope of the power of the board by limiting its right of revision to cases where there is new evidence introduced would in effect nullify the essential advantage of the right of appeal itself.

So it is our opinion that if the record of the case contains competent evidence which was before the collector, it matters not whether such evidence was in the form of oral statement or tangible physical object called an exhibit, the duty of the appellate body is to consider such evidence and to apply the law to it. The board may deem the evidence insufficient to justify reversal or modification of the findings made the basis for appeal, and it may sustain or reverse or modify the decision arrived at by the collector; but consideration of the evidence must be had, independent judgment upon it must be exercised, and independent decision with relation to it must be given.

Thus we are led to observe that decision of a case submitted to the Board of General Appraisers means much more than inquiry into the record merely to ascertain whether the collector acted upon evidence of one or another character, to the end that if it should be found that the decision appealed from was upon inspection of an article of merchandise not of the most ordinary nature, at once there arises lack of power to make an independent decision; hence *pro forma* affirmance must follow. Reasoning along this line of thought would compel the view that the board must exclude all detailed evidentiary demonstration that is furnished by the very subject of the controversy between the Government and the importer. As well might there be excluded from the consideration of an appellate court the device patently simple, yet involved in a patent infringement suit, and to which the judge of the trial court had applied the indisputable axiomatic laws of mechanics as a predicate for his conclusions. A practice of this kind would mean the establishment of rules of evidence by which visual inspection of an article offered would be of no weight unless accompanied by oral expert explanation.

Keeping these general expressions in mind, we return to the particular importation, consisting of gloves, samples of which were before the collector when he made the assessment of duty. We accept as correct that when the board took up the case the presumption

was that the collector had done his duty properly and that this presumption operated in favor of his assessment by attending the case when it was considered by the Board of General Appraisers. But, like presumptions which commonly attend judgments of *nisi prius* courts, it was subject to rebuttal by one properly exercising the right of appeal, provided he could successfully sustain the burden of showing that the finding made was erroneous.

In this respect the attitude of the protestant in a customs matter becomes very similar to that of an appellant in a court of law who seeks a reversal upon the ground that the judgment of the lower court is contrary to the evidence. To recover he must affirmatively satisfy the reviewing judges that the weight of the evidence is against the view of the lower court; but if he succeeds in doing so he must prevail. Whatsoever the samples of the gloves were, howsoever they had been stitched or embroidered, whether there were or were not three single strands or cords of stitching or embroidery, were facts fairly ascertainable by personal inspection, aided by application of definitions of what constitutes cords, strands, and rows of embroidery. It can not be well disputed that the collector was justified in making the classification upon the sample and the advice of the local appraiser. And upon the record which went before the Board of General Appraisers, the case was not one involving trade phrases or facts only to be known after technical explanation of the exhibits in evidence.

While doubtless the decision of any question affecting construction of a manufactured article is often made simple after hearing some explanation of the process and methods of manufacture from those whose experience and special knowledge enable them readily to make those matters clear, yet innumerable instances arise where the deciding power can and must apply a knowledge which is perhaps somewhat out of that invoked in the daily affairs of men, yet is well within the purview of that common knowledge which judicial authority may rely on for the determination of questions presented for decision. This is such an instance. Inspection showed whether there were cords and embroidery, the samples furnishing evidence sufficient, in the opinion of the board, to overcome the presumption in favor of the collector's decision.

The sample is also before us. We find ourselves unable to say that the board erred in holding that the ornamentations upon the gloves are not strands as synonymous with rows of embroidery. *United States v. La Fetra* (172 Fed. Rep., 297); *United States v. Passavant* (154 Fed. Rep., 1005). The merits of this phase of the litigation, however, need not be dwelt upon, inasmuch as the counsel for the Government has submitted the case, insisting not that the actual facts call for maintenance of the collector's action, but that whatever the action of the collector

was this court must sustain it for lack of power in the Board of General Appraisers and in this court to reverse it. Having shown, however, that this latter position is untenable, and that there was evidence before the board sufficient to warrant a reversal, it follows that the decision of the Board of General Appraisers was right, and must be *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

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ACKER v. UNITED STATES (No. 159).<sup>1</sup>

1. LIMITING THE MEANING OF A COMMERCIAL PHRASE.

To fix and limit a phrase to a simple commercial meaning, it is necessary to show not alone that this phrase is improperly employed in describing a given commodity, but at the same time to show it is employed definitely and uniformly in the United States to describe another and different commodity.

2. FRUITS PRESERVED IN SUGAR.

The words "fruits preserved in sugar, molasses, spirits, or in their own juices," occurring in paragraph 263, tariff act of 1897, were not there employed in a commercial or trade sense, but in the sense attaching to these words in common, ordinary usage.

3. CHUTNEY.

It appearing from the evidence that chutney is a fruit, and as imported, preserved in sugar, chutney was dutiable under paragraph 263, tariff act of 1897, and this regardless of whether it may or may not have been included within paragraph 262 of that act.

United States Court of Customs Appeals, March 20, 1911.

APPEAL from United States Circuit Court for Southern District of New York, Abstract 22211 (T. D. 30142).

[Affirmed.]

*B. A. Levett* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Circuit Court for the Southern District of New York affirming a decision of the Board of General Appraisers. The importation is of "chutney." It was assessed for dutiable purposes by the collector of customs at the port of New York as "fruits preserved in sugar, molasses, spirits, or in their own juices," under paragraph 263 of the tariff act of 1897. The importers allege that the proper dutiable classification is under paragraph 262

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<sup>1</sup> Reported in T. D. 31431 (20 Treas. Dec., 584).

as "other edible fruits \* \* \* when dried, desiccated, evaporated, or prepared in any manner," or as an unenumerated manufactured article under the provisions of section 6 of the act.

Chutney as defined by the lexicographers is uniformly described as follows:

Century Dictionary:

*Chutney*.—In the East Indies, a condiment compounded of sweets and acids. Ripe fruit (mangos, tamarinds, cocoanuts, raisins, etc.), spices, sour herbs, cayenne, and lime-juice are the ordinary ingredients. They are pounded and boiled together, and either used immediately, as with curries or stews, or bottled.

Standard Dictionary:

*Chutney*.—A piquant condiment or relish compounded of fruits, spices, chillies, lime-juice, etc.

Oxford Dictionary:

*Chutney*.—A strong, hot relish or condiment compounded of ripe fruits, acids, or sour herbs, and flavored with chillies, spices, etc.

New International Cyclopedia:

*Chutney*.—An East India condiment, a compound of mangoes, chillies, capsicum (*q. v.*), and lime-juice, with other native fruits, such as tamarinds, the flavor being heightened by garlic.

The claim of the importers asserted at the oral argument and in the brief is twofold. First, they maintain that *sirup* when used as a preservative is not within the language of paragraph 263, in that that paragraph provides for fruits preserved in sugar. Secondly, that the words "fruits preserved in sugar, molasses, \* \* \* or in their own juices," as used in paragraph 263 are used in a commercial and trade sense, and not according to the common and ordinary acceptance of that phrase.

The Assistant Attorney General maintains the contrary of the two propositions, and that the merchandise does not come within the description of "other edible fruits \* \* \* prepared in any manner," as used in paragraph 262, claiming that phrase as limited by the doctrine *noscitur a sociis* to the genus of its associate words in the paragraph excludes this merchandise. In our view of the case, decision of this point is unnecessary.

That a preservative of "sirup" is within the term "preserved in sugar," as used in paragraph 263, has been settled by this court in *Austin v. United States*, *supra*, p. 287 (T. D. 31322). The words "fruits preserved in sugar, molasses, spirits, or in their own juices," in substantially the same form have appeared in all tariff acts from and including that of 1883, at least, to and including the existing law. The phrase has been the subject of judicial interpretation by the

Board of General Appraisers, and the courts generally, numerous times.

And, whether it is sought to establish that the words themselves are an *eo nomine* designation as accepted by trade and commerce, or a phrase the general scope of which is limited by accepted application and use thereof by trade and commerce to specific merchandise, the decisions are apparently lacking in uniformity.

The phrase "fruits preserved in \* \* \* spirits," as used in the tariff act of 1897, was, as early as October, 1898, in an exceedingly able and elaborate opinion by Judge Somerville, held not to have been used in a commercial sense. The opinion states:

Merchants have also been examined as to the meaning in the trade and commerce of this country of the phrases "preserved fruits" and "fruits preserved in spirits."

The overwhelming weight of the testimony unquestionably is that in the trade and commerce of this country, on and prior to July 24, 1897, there was no particular commercial or technical meaning attached to these phrases. See G. A. 4296 (T. D. 20212).

On appeal to the United States Circuit Court for the Southern District of Ohio this decision was affirmed, the court saying:

It is also admitted, or too evident to be denied, that the words "fruits preserved in spirits" had no technical or commercial meaning different from their popular and ordinary meaning at the time of the enactment of the tariff law of 1897. See *Voight v. Mihalovitch* (125 Fed. Rep., 78).

Later, in 1899, in G. A. 4503 (T. D. 21428), the board announced the same conclusion.

On appeal to the United States Circuit Court for the Southern District of New York this decision of the board was affirmed by consent without opinion. See T. D. 27397, suits 2984 and 3442.

Again, in G. A. 4663 (T. D. 22039), the board reached the same conclusion. No appeal seems to have been taken from that decision of the board.

So in 1889, in *Levy v. Robertson* (38 Fed. Rep., 714), Judge Lacombe, sitting as circuit judge for the southern district of New York, instructed the jury that in absence of sufficient testimony to the contrary the words "preserved in sugar, spirits, sirup, and molasses," as used in the tariff act of 1883, were used in their ordinary, common, and popular definition.

In February, 1903, in the case of the *United States v. Nordlinger* (121 Fed. Rep., 690), the question was again before the United States Circuit Court of Appeals, Second Circuit, Judges Wallace and Lacombe sitting. The phrase under consideration was "fruits preserved in sugar," as used in the tariff act of 1883. The opinion in that case shows great study and research and announces that the record was voluminous. The testimony in the record was gathered at several ports of the United States. We think the conclusion reached by the

court in that case was sound and that an extended quotation is instructive and warranted. The subject matter being citron, the court said in part:

Fruit thus treated has certainly been preserved in sugar (or in sirup), and would seem to come fairly within the exception. The importers, however, contend that, although in fact preserved in sugar, the language of trade and commerce requires that it shall be admitted free of duty, and a most voluminous record has been presented to enforce such contention. It is suggested that the phrase "fruits preserved in sugar," has such a meaning in trade that citron, although in fact within its terms, must be excluded from the provisions. \* \* \*

\* \* \* It should also be noted that it is not a name to which the importers seek to affix a special trade meaning, as was the case in *Maddock v. Magone* (152 U. S., 371; 14 Sup. Ct., 588, 38 L. Ed., 482), toys; *Bogle v. Magone* (152 U. S., 627, 14 Sup. Ct., 718, 38 L. Ed., 574), sauces; and *American Net & Twine Co. v. Worthington* (141 U. S., 472; 12 Sup. Ct., 55, 35 L. Ed., 821), gilling twine. It is a phrase which would seem to have been selected rather as descriptive of what Congress had in mind than as importing some special trade meaning. It is understood, of course, that a phrase has sometimes been held to have a peculiar meaning when used in a tariff act, because trade used that phrase and used it with such peculiar meaning (*Toplitz v. Hedden*, 146 U. S., 257; 13 Sup. Ct., 70, 36 L. Ed., 961), but quite frequently the use of descriptive language is found to indicate an intention not to use words in any sense different from that which characterizes them in common speech. *Maillard v. Lawrence* (16 How., 251, 14 L. Ed., 925); *DeForest v. Lawrence* (13 How., 274, 14 L. Ed., 143); *Seeburger v. Cahn* (137 U. S., 97; 11 Sup. Ct., 28, 34 L. Ed., 599); *Barber v. Schell* (107 U. S., 617; 2 Sup. Ct., 301, 27 L. Ed., 490); *Newman v. Arthur* (109 U. S., 132; 3 Sup. Ct., 88, 27 L. Ed., 883). Again it is essential to the admission of testimony as to trade meaning that such meaning should differ from the ordinary dictionary meaning, or that of common speech, otherwise such testimony is immaterial. *Maddock v. Magone* (152 U. S., 368; 14 Sup. Ct., 588, 38 L. Ed., 482). Finally, to give to descriptive language some special trade meaning different from its ordinary meaning by proof of commercial usage, the evidence must show that such usage is "definite, uniform, and general, not partial, local, or personal." *Id.* (152 U. S., 368; 14 Sup. Ct., 588, 38 L. Ed., 482). See, also, *Berbecker v. Robertson* (152 U. S., 376; 14 Sup. Ct., 509, 38 L. Ed., 484); *Saltonstall v. Weibusch* (156 U. S., 602; 15 Sup. Ct., 476, 39 L. Ed., 549); *Sonn v. Magone* (139 U. S., 421; 16 Sup. Ct., 67, 40 L. Ed., 203); *Patton v. United States* (159 U. S., 506; 16 Sup. Ct., 89, 40 L. Ed., 233); *Dennison Manufacturing Co. v. United States* (18 C. C. A., 543; 72 Fed. Rep., 259).

After reviewing the voluminous testimony in the record in detail, the court concluded:

Upon this record we are unable to reach the conclusion that the phrase "fruits preserved in sugar" has such a definite, uniform, and general trade meaning that it will not operate to draw out of the third great group of fruits named in the free list, viz, "fruits dried," fruits which, although dried, are also in fact preserved in sugar.

On the other hand, in *United States v. Reiss & Brady* (136 Fed. Rep., 741), decided January 4, 1905, by the Circuit Court of Appeals, Second Circuit, on appeal from G. A. 4946 (T. D. 23130), opinion by Lacombe, judge, the court in construing the phrase "fruits preserved in sugar, molasses, spirits, or their own juices," as used in paragraph 263 of the tariff act of 1897, stated:

We are satisfied that fruits preserved in sugar, in spirits, in juice, etc., are known commercially as a class by themselves, the various fruits which that class includes being prepared for the particular use and put up in the particular form, which use

and form constitute the distinctive characteristics of the category for which those fruits are prepared. Upon that class, as a class well known commercially, Congress has imposed duty by paragraph 263.

Again, in *Causse Manufacturing Co. v. United States*, reported in 151 Fed. Rep., 4, the same court, Judges Wallace, Lacombe, and Townsend sitting, stated *per curiam* as follows:

We are satisfied that the importations were not within the description of paragraph 263. That paragraph is intended to apply to fruits which have been "preserved;" that is, treated so as to become a preserve or comfit, and not to such as merely remain temporarily in their natural juices. As this court pointed out in *United States v. Reiss* (136 Fed. Rep., 741; C. C. A., 393), the paragraph refers to a class of goods which are commercially known and dealt in as preserved fruits.

We are satisfied from a careful consideration of these authorities and the records presented in the several cases, and in the absence of more definite proof than is presented in this record or any other record here reviewed, that the words "fruits preserved in sugar, molasses, spirits, or in their own juices," as used in the tariff act of 1897, were not used in a commercial or trade sense, either *eo nomine* as a trade name or designation or as a descriptive trade phrase limited by the trade understanding to certain classes of merchandise, but that the phrase is used as commonly and generally understood in ordinary parlance.

We are of the opinion that it falls within that class of cases wherein quite frequently the use of descriptive language is found to indicate an intention not to use words in any sense different from that which characterizes them in common speech. *Maillard v. Lawrence* (16 How., 251); *DeForest v. Lawrence* (13 How., 274); *Seeberger v. Cahn* (137 U. S., 97); *Barber v. Schell* (107 U. S., 617); *Newman v. Arthur* (109 U. S., 132).

This conclusion is further reinforced by the fact that in the *Reiss & Brady* case (136 Fed. Rep., 741) the question of commercial designation or the commercial application of the phrase was not an issue. That case was a review of G. A. 4946 (T. D. 23130), upon the effect of the words "fruits preserved in sugar, molasses, spirits, or in their own juices," as used in the act of 1897, and the sole issue in that case decided by the board and necessary to decision in the court of appeals was the relative specificity of the paragraphs under consideration. So far as we are able to gather from the record presented there was neither testimony as to commercial designation nor was that a necessary issue to the decision.

Reading the decision, therefore, in view of the record presented, the statement of the court should be construed rather that the class of goods included within paragraph 263 was a different class of goods from that covered by paragraph 262, and that as to such goods paragraph 263 was the more specific. The same may be said of *Causse Manufacturing Co. v. United States* (151 Fed. Rep., 4). The statement in that case: "\* \* \* the paragraph refers to a class of goods which are commercially known and dealt in as preserved fruits" is



based upon the authority of the Reiss case. Commercial designation was not an issue nor a necessary matter of consideration in the Causse case, and therefore should be regarded merely an obiter reaffirmance of the dictum in the Reiss & Brady case.

While this record tenders testimony in an endeavor to establish that these words are used in a commercial sense, we think the evidence falls far short of that result. While the testimony no doubt is of prime quality, having been uttered by witnesses of long experience in probably the largest houses dealing in this class of goods in the country, the scope of the testimony went only to show that chutney was bought and sold as "chutney," and was not considered or classed by these houses as a preserve or a fruit preserved in its own juices.

The further requisite, however, is necessary in assigning to a phrase a commercial limitation or application that it must be proven not alone that the imported merchandise is not classed therewithin, but there must be assigned by proof to that phrase a scope and meaning which is clearly, definitely, and uniformly understood throughout the United States which includes some other merchandise and excludes the imported merchandise. *Clafflin v. Robertson* (38 Fed. Rep., 92); *Sidenberg v. Robertson* (41 Fed. Rep., 763). It likewise must be shown in such cases that such meaning of the phrase in trade and commerce should differ from the ordinary dictionary meaning or that of common speech. *Maddock v. Magone* (152 U. S., 368).

The *presumption* is, as stated in *Arthur v. Swan* (103 U. S., 597).

While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown.

Until, therefore, the phrase is assigned by testimony some other meaning the presumption obtains.

In this record there is no testimony assigning to the language employed by the statute any general and uniform scope or application in trade and commerce different from its ordinary accepted and dictionary meaning. Nor is there any testimony whatsoever assigning or attempting to assign to the phrase a general and uniform meaning and understanding in trade and commerce including any other particular merchandise as well as excluding the imported merchandise. On the contrary, the record leaves the merchandise, consistent with all the testimony offered, fully within the natural meaning of the language of the statute.

While this merchandise in common parlance, as evidenced by the lexicographic authorities quoted, is deemed a condiment and is known by the specific name "chutney," nevertheless the chemist's analyses in the record indisputably show that of its contents from 35 to 45 per cent consists of dextrose and levulose—sugar. The chemist's certificate further shows that it consisted of "fruits" to which are added

spices and that the preservative is the sirup and the spices. The sweet pungent smell of the samples confirms this.

Being a fruit, therefore, the sugar being the preservative agency regardless of whether it is or is not included within paragraph 262, it is properly dutiable under paragraph 263, that being the more specific provision and the merchandise being within the common and general scope of the words used in that paragraph.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

### KNAUTH v. UNITED STATES (No. 161).<sup>1</sup>

#### 1. SMOKERS' ARTICLES—FIRST USE—CLASSIFICATION.

It is sufficient to bring a commodity within the classification "smokers' articles" if it is shown the article must have passed with its first use into the hands of a consumer for use as a smokers' article.

#### 2. SAME—USE IN CHIEF—CLASSIFICATION.

Use in chief controls in classification, and the consignment of tin boxes here, being in shape, size, and markings plainly designed for use by smokers, could not properly be classed as manufactures of metal, and the boxes were properly held dutiable as smokers' articles under paragraph 459, tariff act of 1897.—*Steinhardt v. United States* (126 Fed. Rep., 443) approved.

United States Court of Customs Appeals, March 20, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22155 (T. D. 30111); Abstract 22273 (T. D. 30165).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Knauth, Nachod & Kuhne, of New York, in 1908 imported at that port certain tin cigarette boxes. They are approximately 3 by 4 inches in size, made up with rounded corners and ornamented in a crude way by impressions from the interior of the tin. On one side appear the words "Alma Cigarettes" and "Khedivial Co., N. Y.," between which is a representation of the sword and fez of the Khedive. On the other side the word "Alma" with the same impression, both impressions being surrounded with lines intended for ornamental purposes. They are in shape, ornamentation, and in every respect the size and construction of the conventional cigarette box for pocket use.

Accompanying the record as one of the exhibits in the case is a package of "Alma cigarettes," done up in paper, sealed with the proper revenue stamp, of the accurate size to be slipped into the box described. There is a revenue notice on the paper inclosing the ciga-

<sup>1</sup> Reported in T. D. 31432 (20 Treas. Dec., 540).

rettes, but none upon the box itself, and while the paper package of cigarettes is evidently manufactured in the city of New York, because the notice emanates from "Factory No. 5, 2nd District of New York," the tin box, as stated, is imported, having been manufactured in Dresden, Germany.

The collector assessed duty at the rate of 60 per cent ad valorem upon the tin boxes as smokers' articles, under the provisions of paragraph 459 of the tariff act of 1897, which provides that rate upon "all smokers' articles whatsoever."

459. Pipes and smokers' articles: Common tobacco pipes and pipe bowls made wholly of clay, valued at not more than forty cents per gross, fifteen cents per gross; other tobacco pipes and pipe bowls of clay, fifty cents per gross and twenty-five per centum ad valorem; other pipes and pipe bowls, of whatever material composed, and all smokers' articles whatsoever, not specially provided for in this act, including cigarette books, cigarette-book covers, pouches for smoking or chewing tobacco, and cigarette paper in all forms, sixty per centum ad valorem.

The importers claim them properly dutiable as "a manufacture of metal" under paragraph 193 of the same act.

The words "all smokers' articles whatsoever" are broad enough, in the opinion of the court, to include this merchandise. We think it fully within the principles laid down by the United States Circuit Court for the Southern District of New York in *Steinhardt & Bro. v. United States* (126 Fed. Rep., 443), and approve the principles of that decision.

The samples themselves are ample conviction to the mind that the sole and only use of the imported merchandise is for smokers. There is some testimony in the record and other allusion to an internal-revenue provision prohibiting the use of such boxes a second time. Without entering into any discussion on the subject of whether or not that would apply to the boxes in the hands of the consumer, we think it entirely sufficient to come within the category of a smoker's article that the box be used in the hands of one consumer and that during the consumption of the contents purchased with the same, no subsequent or other use being shown. We can not conceive of any other use and the record discloses no other, but, on the contrary, shows that to be the sole use to which the article is devoted. There is no requirement of a more extended purpose. The doctrine of chief use would alone seem to be sufficient to control this case. *Magone v. Wiederer* (159 U. S., 555); *Magone v. Heller* (150 U. S., 70).

The phrase as used in the statute, "all smokers' articles whatsoever," is exceedingly comprehensive. The use of both words "all" and "whatsoever" seems to leave little doubt as to the intention of the legislature. "Whatsoever" is an intensified form of "whatever." The uniform definition is:

Of whatever nature, kind, or sort; \* \* \* what thing or things soever; no matter what thing or things; \* \* \*.

The intensified form of the expression used, together with the far-reaching effect of the qualifying words stated, manifests to our mind a purpose on the part of the legislature to reach out into all branches of trade and commerce and to gather within the dutiable provisions of this paragraph everything used chiefly by smokers, in that pursuit, and for that purpose, wherever else they may occur or within whatever other provisions of the tariff law the merchandise may be included.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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BUSCHOFF *v.* UNITED STATES (No. 205).<sup>1</sup>

HIDES REMOVED ABROAD FROM CATTLE EXPORTED ALIVE FROM UNITED STATES.

Where hides have been removed abroad from American cattle exported alive and these hides so removed returned here as imports, they are not to be deemed articles of the growth, produce, and manufacture of the United States and as such free of duty, but as hides of cattle as described in paragraph 437, tariff act of 1897, and were dutiable under that paragraph.

United States Court of Customs Appeals, March 20, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 22697 (T. D. 30356).

[Affirmed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts, Rufus W. Sprague, jr., of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

This is an appeal from a decision of the United States Board of General Appraisers sustaining the action of the collector of the port of New York in levying duty upon certain cattle hides imported by appellants, under the provisions of paragraph 437 of the tariff act of 1897. The hides are from cattle exported from the United States. The appellants' contention is that the hides should be admitted to the United States free of duty under paragraph 483 of the tariff act of 1897.

The pertinent provisions of the sections of the act involved are as follows:

437. Hides of cattle, raw or uncured, whether dry, salted, or pickled, fifteen per centum ad valorem: *Provided*, That upon all leather exported, made from imported hides, there shall be allowed a drawback \* \* \*.

483. Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; \* \* \* but

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<sup>1</sup> Reported in T. D. 31433 (20 Treas. Dec., 542).

proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, \* \* \*: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made \* \* \*.

Several arguments have been presented by the appellants in support of their contention for a reversal of the decision of the board, but we think it so plain that the hides involved are not articles the growth, produce, or manufacture of the United States, but are hides of cattle specifically provided for, that only one conclusion becomes tenable.

With paragraph 437 declaring in unequivocal language what duty shall be put upon hides, and the articles under consideration being hides, the general language of paragraph 483 can not be held to include as articles the produce of the United States hides of animals which were alive when taken from the United States, and which are expressly elsewhere provided for.

Hides of cattle imported are the skins taken from animals, and as such are commodities distinct and different from live cattle exported.

We therefore hold that the hides are subject to assessment for duty under the terms of section 437.

The decision of the board is *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH and BARBER, Judges, concur. DE VRIES, Judge, being disqualified, took no part in the hearing or decision of this case.

#### UNITED STATES v. DOWNING (No. 252).<sup>1</sup>

##### BURIAL OR BRIDAL WREATHS IN CHIEF VALUE OF METAL.

The importation consisting of burial or bridal wreaths made of wax, cotton, tin, wire, and other metal did not come within that clause of paragraph 425, tariff act of 1897, limited to feathers, fruits, grains, leaves, flowers and stems or parts thereof; but, as appears from the evidence, being made substantially in part of metal and that metal gave shape, form, and name to the articles and determined their use, they were dutiable under paragraph 193 of that act.—*Seeberger v. Schlesinger* (152 U. S., 581, 587) cited and approved.

United States Court of Customs Appeals, March 20, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23470 (T. D. 30691).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

*Lester C. Childs* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The importing firm imported at the port of Chicago burial and bridal wreaths. They are made up of wax, cotton, tin, wire, and

<sup>1</sup> Reported in T. D. 31434 (20 Treas. Dec., 543).

other metal. They are in imitation of such articles when made of flowers, leaves, and wire. The Board of General Appraisers found that they were in chief value of metal. It is made perfectly clear by the record that they are at least substantially in part of metal. They were classified for duty by the collector of the port of Chicago under paragraph 425 of the tariff act of 1897 as "artificial or ornamental leaves, flowers, and stems or parts thereof, of whatever material composed," which paragraph reads:

425. Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this act, fifteen per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, including quilts of down and other manufactures of down, and also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem.

The importers' contention is that they are dutiable either as unenumerated manufactured articles under section 6 or at the rate of 45 per cent ad valorem under paragraph 193 of that act as—

Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, \* \* \* or other metal, and whether partly or wholly manufactured, \* \* \*.

Inasmuch as it appears that some confusion of authority has arisen upon the subject matter and the interpretation of the applicable provisions of the tariff law, it becomes important to bear in mind that this record discloses, and the fact has been particularly emphasized with reference to these importations, that they are substantially, if not chiefly, metal in value. The wire, tin, and other metal in the articles are employed to assemble the other component materials from their category of materials for use of the manufacturer into completed articles made up and ready for their ultimate and final use by the consumer. They give form, shape, and character to the merchandise, and their employment in the manner stated causes the completed article to be known, so far as the record shows, under different and distinct names, such as "bridal wreaths" and "burial wreaths."

In January, 1907, the United States Circuit Court for the Southern District of New York, in *Kreshower v. United States* (152 Fed. Rep., 485), Hazel, Judge, was called upon to determine the proper classification of this merchandise. The court in that case held that the wreaths of leaves were properly dutiable under paragraph 425 as artificial or ornamental leaves. It will be noted, however, in passing that the court in that case laid special stress upon the fact stated in the opinion, "the wire attachment certainly was not a component part of the wreath, but it seems to have been merely an incidental part thereof."

In June, 1907, the United States Circuit Court for the Southern District of New York, Martin, Judge, held that feather boas held together by a cord of little value were dutiable by virtue of the operation of section 7 of the tariff act of 1897 as feathers under paragraph 425. The court laid special stress upon the fact that the cotton cord was of insignificant value compared with the value of the feathers.

In February, 1909, in the case of the *United States v. Berlinger* (167 Fed. Rep., 800), the United States Circuit Court of Appeals for the Second Circuit held feather boas composed of ornamental feathers and a small quantity of wire were dutiable under paragraph 193 as "articles or wares composed wholly or in part of iron, steel, or other metal, not specially provided for," and not as "feathers advanced or manufactured in any manner" under said paragraph 425. That case is relied upon as an authority here by the importer. The provisions of the portion of paragraph 425 as to "feathers advanced or manufactured in any manner" and the latter part as to "grasses" and "flowers" are not entirely the same, in fact greatly differ, and the court here expresses no opinion or dissent from the reasoning or the conclusion reached by the court in the *Berlinger* case.

In November, 1909, the identical point as to wreaths made up of ornamental leaves and wire was before the United States Circuit Court of Appeals for the Third Circuit, in *United States v. Bayersdorfer* (175 Fed. Rep., 959), and that court held that they were dutiable as artificial or ornamental leaves not specially provided for under the provisions of paragraph 425, affirming the court below upon that point.

The *Berlinger* case was urged upon that court by the importers as an authority to the contrary. The court for the third circuit either considered that the cases presented were not parallel by reason of the difference in the reading of the provisions of law, for which assumption there is ample warrant, or that there was a difference in the facts presented. It refused to follow the *Berlinger* case. The court below had expressly followed the *Kreshower* case (152 Fed. Rep., 485), and commended the reasoning in that case. Inasmuch as that case was expressly based upon the fact that the metal was comparatively an insignificant portion of the imported article, it may be possible that the court regarded the facts the same.

As we read paragraph 425, and particularly the latter portion thereof, it is limited to feathers, fruits, grains, leaves, flowers, and stems or parts thereof, and does not extend to any manufactures made up of these. Whenever, therefore, an imported article is to be classified for duty as one of these articles it must be at least substantially within the enumerations of the statute. These importations, however, have passed beyond that category; they are now substantially in part of metal. They have taken on new form and shape and a new name. They are manipulations, and manufacture has devoted

them to specific purposes. That manufacture has employed in its use another material, to wit, metal, which in a substantial, if not a controlling factor, has given shape, form, name, and determined the use of the imported article. We are, therefore, to inquire, under the terms of paragraph 425, admitting the imported article to be composed of leaves, flowers, etc., whether or not it is in any other part of the act specially provided for.

Paragraph 193 provides for manufactures wholly or in part of metal. That "manufactures of" is a specific designation for the purposes of tariff construction is a well-settled proposition. See *Arthur v. Butterfield* (125 U. S., 70). Being "specially provided for," they are taken out of the provisions of paragraph 425 by the excepting clause therein, "not specially provided for in this act."

We think that the principles of this case are settled by *Seeburger v. Schlesinger* (152 U. S., 581, 587). It will be noted in that case the language the subject of consideration by the court, while not so comprehensive as the language in the first part of paragraph 425, "*manufactured in any manner*," was more comprehensive than the provision of paragraph 425 here under consideration, "artificial or ornamental \* \* \* leaves, flowers, \* \* \* and stems or parts thereof, of whatever material composed."

The language of the statute considered by the Supreme Court was "shells, whole or parts of, manufactured." The importation was "shell-covered opera glasses, composed of shell, metal, and glass." The same contention was made in that case as here by the Government, that they were dutiable as shells, either directly or by virtue of a similar provision to section 7 here invoked by the Government, to wit, section 2499 of the Revised Statutes, then in force. The importer made the same contention as is here made.

The court said:

We think that the court was in error in holding that the articles in question were shells, whole or parts of, manufactured, as this clause was obviously intended to apply to articles made entirely, or nearly so, of shell, such as combs, bracelets, chains, and lorgnons, and not to articles of which shell was a mere component, though perhaps, as in this case, the most valuable, part. Nor are we satisfied that they should be classed as "articles manufactured from two or more materials," in which case, by Revised Statutes, section 2499, as amended by the act of 1883 (22 Stat., 491), duty should be assessed at the highest rate at which the component material of chief value may be chargeable. In view of the more specific designation in Schedule C, page 501, of "manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of \* \* \* metal," and in view of the fact that, while the metal is not the component of chief value, it is a substantial part of the finished glass, and the framework upon which the lenses and shell are mounted, we think these articles should be classed as manufactures of metal. We do not wish to be understood as holding that, if the metal be a mere incident or an immaterial part of the completed article, as, for instance, the screws or knobs upon an article of household furniture, or the buttons upon an article of clothing, such articles should be classified as manufactures in part of metal; but where, as in this case, they form a necessary and substantial part of the article, we think this clause should determine their classification.



The court is of the opinion that the merchandise is properly dutiable as claimed by the importer.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur. .

UNITED STATES v. YAMASHITA (No. 261). UNITED STATES v. FURUYA (No. 262).<sup>1</sup>

1. DRIED FISH IN PAPER PACKAGES.

Dried fish in 1-pound paper packages that have been sealed and placed in numbers from 100 to 110 packages in a box were not dutiable under paragraph 258, tariff act of 1897, the 1-pound package being wrongly taken as a unit for classification.

2. SAME—HOW DUTIABLE.

The larger wooden box, containing, of the 1-pound packages of fish, a hundred or more, was the proper unit for classification and so the importation was dutiable under paragraph 261, tariff act of 1897.—John R. Fulton & Co., G. A. 4743 (T. D. 22414), *In re Johnson* (56 Fed. Rep., 822), and *Kauffman Bros. v. United States* (99 Fed. Rep., 430) distinguished.

United States Court of Customs Appeals, March 20, 1911.

APPEAL from United States Circuit Court for Western District of Washington, Abstracts 7521-7522 (T. D. 26637) and T. D. 30317.

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn, J. Stuart Tompkins* of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, judge, delivered the opinion of the court:

The merchandise involved in this case consists of dried fish, packed in 1-pound paper packages, sealed, and ready for sale, such sealed packages being in turn packed in wooden packing boxes or cases, and thus imported into the United States.

The merchandise was classified and assessed for duty by the collector of customs for the collection district of Puget Sound, Wash., at 30 per cent ad valorem under the provisions of paragraph 258 of the tariff act of 1897, as fish in packages containing less than one-half barrel and not specially provided for in said act. The importers, claiming that the merchandise was liable to duty under paragraph 261 of said act at the rate of three-fourths of 1 cent per pound, appealed to the United States Board of General Appraisers. The board reversed the collector's decision. The Government then appealed to the United States Circuit Court for the Northern Division of the Western District of the State of Washington, where the

<sup>1</sup> Reported in T. D. 31435 (20 Treas. Dec., 547).

decision of the Board of General Appraisers was sustained. From the decision of the circuit court the Government has appealed.

Paragraph 258 of the tariff act of 1897, under which the Government claims duty should be levied, reads as follows:

Fish known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box, or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box, or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, box or can; if in other packages, forty per centum ad valorem. All other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages containing less than one-half barrel and not specially provided for in this act, thirty per centum ad valorem.

Paragraph 261, which is that applied by the circuit court, is also quoted:

Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut, or salmon, fresh, pickled, or salted, one cent per pound.

We must inquire whether for the purposes of levying duty upon the importation the "package" upon which duty is levied is the wooden box containing the 1-pound packages of fish, which is more than one-half barrel capacity, or whether it is the 1-pound paper package, a number of which packages are packed together in the box or case.

We will first refer to the contention of the Government that "neither the board nor the court below made a finding of fact that the fish were in original packages containing more than one-half barrel, and there is no evidence to sustain such a finding."

The deputy collector of customs at Port Townsend testified that the merchandise is a small fish, the product of Japan, known as "iriko," and that it is imported in packages such as the exhibit which he produced in court, containing practically 1 pound each. The witness said:

The collector classified the goods as fish in packages of less than one-half barrel under paragraph 258, and the board's decision held them dutiable as fish in compartment packages. An appeal was taken by the department, contending that the fish are in packages of less than one-half barrel, from the fact that they are packed in 1-pound paper packages, sealed, and are sold from shelves by retailers in the condition as imported; \* \* \* that the paper packages are packed from 100 to 110 packages to a case—in a wooden box; \* \* \*.

It would seem from this testimony that the circuit court had before it sufficient evidence to justify the conclusion that 100 to 110 pound paper packages of fish required a box or case to contain them of a capacity more than one-half barrel.

We now pass to the argument of counsel for the United States that "the package the size of which determines the classification is the immediate container and not the outside packing case." This argument is undoubtedly sound where the facts are that the merchandise is packed in separate and substantial packages or tin cans, which in themselves become outside containers, and where such containers are merely fastened together in an outside box or container in such a way that when the principal outside container is broken the smaller inside packages are detached from one another. Such a case was that of the protest of R. M. Kelley, G. A. 6166 (T. D. 26769).

There, four boxes, each containing 25 pounds of smelts, were placed end to end and secured together by nailing a board along the tops and another board along the bottoms of the boxes, so that by merely sawing through the top and bottom boards in three places the four boxes would be detached. It was said that "the fish in question were packed in packages containing less than one-half barrel, and that they did not cease to be so packed when these packages were fastened together by boards running along their tops and bottoms." It was also held that the method of packing was to escape higher duty. The merchandise was therefore classified under the provision in paragraph 258, tariff act of 1897, for "fish in packages containing less than one-half barrel."

We find no serious claim in the present instance that the pound packages of fish were packed in the wooden box or case for the purpose of evading the payment of a higher duty or that the manner of packing showed a clever subterfuge on the part of the importers to escape the payment of a higher duty.

Another case to be distinguished is that of the protest of John R. Fulton & Co., G. A. 4743 (T. D. 22414). The merchandise involved in that case was dried fish, imported in tin boxes packed in turn in a wooden box, the object of the tin package being hermetically to seal the contents against atmospheric influences, the object of the wooden covering being to make the whole safely transportable. The United States Board of General Appraisers held that—

The merchandise is undoubtedly packed in tin packages within the meaning of the provision; otherwise it would be possible to absolutely avoid it by placing each tin package inside of a wooden or other covering.

The board also stated as follows:

Congress, as was said by Lacombe, J., in the case of *In re Johnson* (56 Fed. Rep., 822), apparently intended "not so much to lay the duty on fish, but to lay the duty upon the tin cans that brought the fish in," and it follows that this merchandise must be classified as fish in tin packages.

Duty was assessed in the Fulton case, therefore, under the provisions of paragraph 258 of the act of 1897. This case is not directly in point, for the fish in the Fulton case were packed in tins as an inside

covering, while in the present case the initial covering is paper. And it hardly seems possible that Congress intended to lay a duty on the paper in which the fish were wrapped, or to regard it as in itself a container or package.

In the case of *In re Johnson* (56 Fed. Rep., 822), cited in the *Fulton case*, *supra*, the merchandise consisted of various kinds of herring, packed in hermetically sealed tin cans. The court held the merchandise dutiable under schedule G, paragraph 295, of the tariff act of October 1, 1890, as "fish in cans or packages made of tin," at 30 per cent ad valorem, and not as "fish, smoked, dried, salted, pickled, frozen, packed in ice, or otherwise prepared for preservation," under paragraph 293 of said schedule and tariff act, or as "herrings, pickled or salted," or as "herrings, fresh." The court said:

\* \* \* There should be laid a duty of 30 per cent ad valorem, \* \* \* the apparent intent being not so much to lay the duty upon fish, but to lay a duty upon the tin can that brought the fish in, \* \* \*.

The Government also cites the case of *Kauffmann Brothers v. United States* (99 Fed. Rep., 430), in which fish in tins, pickled with vinegar, and known as "Bismarck herrings," were held to be dutiable under paragraph 258 of the tariff act of 1897, under the provision for "all other fish except shellfish, in tin packages," at 30 per cent ad valorem, and not as "pickled herrings," at one-half of 1 cent per pound. The court there said:

\* \* \* I think Congress intended, by the provision for a duty of 30 per cent on "all other fish, in tin packages," to provide that any fish imported in such packages should pay the duty of 30 per cent, irrespective of the kind of fish therein. As Judge Lacombe says in the *Johnson case*, "the apparent intention is not so much to lay the duty on fish, but to lay the duty upon the tin cans that brought the fish in."

That case may also be distinguished from the one under consideration, as has been the *Fulton case* (*supra*). There being a specific provision for "all other fish, in tin packages," the court properly held that fish in tin packages were dutiable thereunder; but as already said, we must not lose thought that in the present case the fish are wrapped in paper packages and that no language of the act of 1897 specifically covers fish so contained.

Counsel for the Government assert that Congress by the words "packages containing less than one-half barrel," in paragraph 258, intended to describe the immediate container of the small retail size because of the language of the other clauses of that paragraph. This argument must be based upon the ground that the use of the words "bottle, jar, box or can," which occur in section 258 (quoted in full, *supra*), indicates that the correct rule is to construe a package to be the small paper parcel or container which is put into the large container. But the doctrine of *noscitur a sociis* must give way to the fact that in the use of the specific word "package" Congress meant

to provide specially for fish in packages as a "package" had been regarded prior to the date of the enactment of the tariff law of 1897. Looking into what constitutes a package in commerce as between foreign lands and ours, we find that it is the unit transported from the country of export to the United States. In an opinion of marked ability (*Guckenheimer et al. v. Sellers et al.*, 81 Fed. Rep., 997), Judge Simonton said:

The Federal cases are few in number. Judge Hall, of the district of Mississippi, held, *In re Harmon* (43 Fed. Rep., 372), that when bottles of whisky were put in a wooden box, and so imported, the box, and not the bottles, was the original package. The Circuit Court of Appeals of the Seventh Circuit, in *United States v. One Hundred and Thirty-two Packages of Spirituous Liquors and Wines* (22 C. C. A., 228; 76 Fed. Rep., 364), discuss the meaning of the word "package," as used in section 3449, Revised Statutes, United States: "The term 'package' means every box, barrel, or other receptacle into which distilled spirits have been placed for shipment or removal, either in quantity or in separate small packages, as bottles or jugs." \* \* \* The importer decides for himself the size and form of the package which he seeks to import. He puts it up in the shape in which he wishes to import it, gives it the initial steps which put it in transit, and so makes it the subject of interstate commerce. "The original package was and is the package as it existed at the time of its transportation from one State to another." *State v. Winters* (Kan. Sup.), 25 Pac., 237. "An original package is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance." *State v. Board of Assessors* (La.) 15 South., 10.

\* \* \* \* \*

Considering all these cases and the others quoted in argument, it appears that the original package is the package delivered by the importer to the carrier at the initial place of shipment in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle, in the one instance, the three or more bottles in another instance, the barrel, box, crate, or other receptacle, respectively, constitute the original package. If sold or delivered, it must be sold or delivered as shipped and received. If the package be broken after such delivery, it comes within the police regulations of the State, and any sale or delivery in such case is unlawful.

See also *Leisy v. Hardin* (135 U. S., 110); *Commonwealth v. Schollenberger* (27 Atl. Rep., Pa., 30); *Haley v. State* (60 N. W., Nebr., 362). These decisions sustain what seems to us to be the more reasonable view under the evidence, namely, that the box in which the fish were packed for transportation properly constituted the package by which classification was made.

There is also some support for this construction in the decision of the Board of General Appraisers in the matter of William Rueff, G. A. 6531 (T. D. 27871). The point considered in Rueff's case turned upon what constituted a package under the provisions of paragraph 296 of the tariff act of 1897, which reads as follows:

\* \* \* Wines, cordials, brandy, and other spirituous liquors, including bitters of all kinds, and bay rum or bay water, imported in bottles or jugs, shall be packed in packages containing not less than 1 dozen bottles or jugs in each package, or duty shall be paid as if such package contained at least 1 dozen bottles or jugs \* \* \*.

The merchandise consisted of 4 cases of French brandy, each containing 6 quart bottles, all tied together in one package by a strap, making 24 quart bottles inclosed in one strap. It was held that the merchandise was a single package, and that the brandy was dutiable according to the number of gallons contained in the package.

Without extending the discussion, our conclusion is that it was intended that fish in packages, as included in the statute, are fish put up in separate containers, suitable in themselves as containers, and not, as in the case before us, fish in paper bundles, the bundles being put into large wooden boxes or cases, which we think are more properly dutiable under the provisions of section 261, heretofore quoted.

The judgment of the circuit court is *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

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#### MENDELSON v. UNITED STATES (No. 34).<sup>1</sup>

##### 1. "SILKS IN THE GUM" AND "SILKS BOILED OFF."

The terms "silk in the gum" and "silk boiled off" as such are not terms of common, ordinary, or popular usage. They are terms coined and employed by English-speaking manufacturers, converters, dyers, and printers of silks to identify textiles of silk at particular stages of their manufacture. And while these terms may not be used generally by all importers and dealers in silks, their use is definite, uniform, and general with those whose business obliges them to distinguish between the crude fabric and the one which has been further advanced, and the general meaning given to them by that branch of the silk trade which invented and employs them should prevail.

##### 2. SAME—QUESTION OF FACT.

Whether the fabric actually falls within the meaning of "silks boiled off" or within that of "silks in the gum" is a question of fact and not of mere name independent of the processes to which the silk cloth has been subjected and the results thereby accomplished.

##### 3. "SILKS BOILED OFF."

If it be conceded, as contended by the importer, that a silk "boiled off" signifies a silk from which all the gum has been removed by boiling, or such a percentage of it as will make it fit for dyeing or printing, then the burden is on the importer to show by a preponderance of evidence that the gum had not been so removed.

##### 4. SAME—PROOF.

If "boiled off" be regarded as a mere process of manufacture, and if the question of whether the silks were or were not boiled off be considered as one purely of fact, then it would be incumbent on the importer to show by a preponderance of evidence that the silks had not been submitted to that process, and had not been, as a matter of fact, boiled off.

##### 5. PROOF ON TEST OF SILKS IN THE GUM.

If, on test, a loss of 5 per cent or more in the weight of the fabric is considered conclusive that the silks are still in the gum and not boiled off, then the importer must show the loss of this percentage in weight by a preponderance of evidence.

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<sup>1</sup>Reported in T. D. 31451 (20 Treas. Dec., 577).

## 6. HABUTAI SILKS—HOW DUTIABLE.

Whether the decision here is made to depend on the meaning properly to be given to the terms "silk in the gum" and "silk boiled off," or on the loss of weight shown in the commodity by boiling-off tests, or on testimony as to whether the silks had been actually boiled off and were fit for dyeing and printing: *Held* that the Habutai silks in question are boiled-off silks and as such were dutiable as assessed under paragraph 387, tariff act of 1897.

United States Court of Customs Appeals, March 27, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6911 (T. D. 29789).

[Affirmed.]

*Walden & Webster* (Howard T. Walden of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain woven fabrics in the piece, composed entirely of silk, were held by the collector of customs at the port of New York to be "boiled off," and he therefore assessed them for duty at \$3 per pound under paragraph 387 of the tariff act of 1897, which paragraph reads in part as follows:

387. Woven fabrics in the piece, \* \* \* if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, \* \* \* *if boiled off*, \* \* \* three dollars per pound.

To this ruling the importers objected, and among other grounds of protest set up that the silk fabrics imported were still "in the gum" and not "boiled off" and that they should therefore be assessed for duty at \$2.50 per pound under that part of paragraph 387 which reads as follows:

387. Woven fabrics in the piece, \* \* \* if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, \* \* \* *if in the gum*, two dollars and fifty cents per pound.

The Board of General Appraisers sustained the collector and the importers appealed to the United States Circuit Court for the Southern District of New York, which appeal has been certified to this court for determination in accordance with the provisions of the tariff act of August 5, 1909.

The appeal raises but one real issue, and that is, Were the silks at the time of importation "boiled off" or were they still "in the gum"? It appears from the evidence in the case that the goods in question are known as Habutai silks, which are produced in Japan in the Provinces of Echizen, Fukui, Kaga, and Kawamata from the thread of the cultivated silkworm. This worm, it appears, spins into the form of a cocoon a fine silk thread composed of three or more finer threads bound together by a natural gum. From the cocoon this thread is wound

into a yarn which retains some, if not all, of the natural gum. The yarn which is to constitute the warp threads on the loom is treated before weaving with a gelatin or glue made of vegetable wax and seaweed or some starchy substance, and this, together with the natural gum of both warp and weft threads, lends to the silk filaments the strength necessary to withstand the strain of weaving. Cloth woven from such yarn is stiff, hard, wiry, lusterless, brown or between buff and yellow in color, and so unsilky in appearance that it would not be identified as silk by those acquainted only with the finished article. The textile at this stage of manufacture is known as "silk in the gum" or "in the gray," and is not marketable for consumption. To make it marketable for consumption, as well as to fit it for dyeing or printing, it is necessary to remove the gum. This is accomplished by boiling the fabric in water containing olive-oil soap for a period which varies according to the weight of the goods, their quality, and the custom of the particular manufacturer.

Silk fabrics so treated lose their crude, unattractive features and are known, at least to manufacturers, converters, dyers, and printers of silk as "silks boiled off." The expressions "silks in the gum" and "silks boiled off" are not terms of common, ordinary use. As *terms* they have not found their way into the vocabulary of the mass and body of English-speaking peoples and have no popular signification. Apparently they are expressions coined by English-speaking manufacturers, converters, dyers, and printers of silk to identify textiles of silk at particular stages of their manufacture. By them importers for manufacture and conversion distinguish between the dull, stiff, hard, wiry, lusterless, unattractive silk fabric as it comes from the loom woven from the silk filaments to which the natural gum still adheres and the silk fabric similarly woven which, degummed by a process of boiling, has become bright, soft, lustrous, and flexible. True, the use of these terms is largely confined to manufacturers, converters, dyers, and printers of silk, and does not extend to importers of silk or wholesale dealers in silk for consumption. But as the terms *as such* have no common, ordinary, popular meaning it does seem not wholly unreasonable to assume that when Congress employed them it intended that they should have the sense and meaning which they were understood to convey to the class of silk dealers which for the purposes of its particular branch of the silk business invented them to distinguish crude silk fabrics from the more advanced product. Otherwise the terms *as terms* would be left without any meaning at all. "Silks boiled off" and "silks in the gum" are terms of distinction, and their use for that purpose is definite, uniform, and general with those whose business obliges them to distinguish between the crude fabric and the one which has been further advanced.



Whether the fabric actually falls within the meaning of one expression or the other is a question of fact and not of mere name independent of the processes to which the silk cloth has been subjected and the results thereby accomplished.

The official samples received in evidence are not dull in color, or stiff, wiry, or hard to the touch. Quite the contrary, they are clear white, lustrous in appearance, soft and flexible to the hand, and even to the ordinary observer have the physical characteristics of silk. They have passed the stage of silks "in the gum." Indeed, the testimony both for the importers and the Government is to the effect that they are not "in the gum," and that just as they stand they are salable to the consumer, "to the department stores, and dealers in ladies' dress goods." Having ceased to be silks "in the gum," and a boiling process having removed the imperfections and blemishes caused by the gum in the crude product, it would seem certain that the goods under consideration have reached the status of "silks boiled off," especially as they have the qualities which the "boiling off" process is designed to produce.

But eliminating the meaning given to the expression "silks boiled off" by the branches of the silk trade which originated it, and considering the term standing by itself and not in apposition to that of "silks in the gum," and giving to the former the meaning contended for by the importer, namely, a silk from which *all* the gum has been removed by boiling, or such percentage of it as would render it fit for dyeing or printing, the burden was on the importers to show that the gum had not been so removed, and that showing they have failed to make out by a preponderance of evidence. Only one witness on the part of the importers, namely, William A. Arnold, testifies as to the weight lost by the samples on test. He is a practical dyer and printer and declares that he tested the samples by boiling them for about two hours in water in a 10 per cent solution of olive-oil soap. He found that Exhibit 1 before testing weighed, *without drying out*, 4.121 grams, and after boiling *and drying*, 3.795 grams, which was a loss of 0.326 gram, or 7.91 per cent. Exhibit 2 before testing weighed, *without drying out*, 19.76 grams, and after boiling *and drying*, 18.70 grams, which was a loss of 1.06 grams, or 5.36 per cent of its weight. Exhibit 3 before testing weighed, *without drying out*, 8.06 grams, and after boiling *and drying*, 7.725 grams, which was a loss of 0.335 gram, or 4.15 per cent of its weight. Exhibit 4 before testing weighed, *without drying out*, 11.05 grams, and after boiling *and drying*, 10.65 grams, which was a loss of 0.40 gram, or 3.61 per cent of its weight. In this connection it will be noted that Mr. Arnold *did not dry out the samples before testing them*, which, according to the preponderance of testimony, left from 6 to 10 per cent of moisture in the original

weights. On the part of the Government *six* witnesses made "boiling off" tests and testified as to the results obtained. Wilton G. Berry, Government chemist, made two tests, one with satisfactory and one with unsatisfactory samples. From the satisfactory samples, *dried before weighing and testing*, he secured the following results:

Exhibit 2, after boiling two hours in a 10 per cent solution of olive-oil soap, lost 1.46 per cent in weight.

Exhibit 3, after boiling two hours in a 1 per cent solution of olive-oil soap, lost 2.93 per cent.

Exhibit 3, after boiling one-half hour in a 10 per cent solution of olive-oil soap, lost 3.76 per cent in weight.

Exhibit 4, after boiling one-half hour in a  $2\frac{1}{2}$  per cent solution of olive-oil soap, lost 1.87 per cent in weight.

Carl Schoen, a silk manufacturer and one of the managing directors of the United States Silk Conditioning Works, a concern which makes tests of silk for the trade, testified that he weighed Exhibits 3 and 4 and found the gross weight to be 43.2 and 28.1, respectively; that after drying out both samples and reweighing them he found that official Exhibit 3 had lost 2 grams, and that official Exhibit 4 had lost 3.5 grams on account of moisture expelled; that after boiling both samples for one-half hour in water and olive-oil soap, rinsing them in clean water, boiling them again for another half hour, rinsing them again, and putting them through a wringer, he found on reweighing after drying that they had lost the following percentages of their weight: Official Exhibit 3, 1.92 per cent; official Exhibit 4, 1 per cent.

Gottlieb Epprecht, a tester of silk, testified that after drying and weighing Exhibit 9, which was a part of official Exhibit 4, it lost, on account of moisture expelled, 10 per cent in weight; that he then boiled the sample for one-half hour in soap and distilled water in the proportion of  $2\frac{1}{2}$  pounds of soap to 100 pounds of water, and after drying found no loss of weight. He further stated that he took raw habutai, boiled it in a  $2\frac{1}{2}$  per cent soap solution for half an hour, then washed it in boiling water, put it through an acid bath, wrung it out, and after drying it out until it reached a constant weight, he found that the loss was 23.03 per cent. Another piece of the same material boiled in the same solution for one and one-half hours and subsequently treated as was the first piece lost 23.53 per cent. A third piece of the same material boiled for one-half hour in a 10 per cent solution of soap as compared with the water and treated as were the other pieces lost 23.03 per cent, the same loss which was shown by using a  $2\frac{1}{2}$  per cent solution of soap. A fourth piece boiled for one and one-half hours in a 10 per cent solution of soap and receiving the same subsequent treatment as was given in the other tests showed a loss of 24.03 per cent

in weight. From this it would appear that whether the solution of soap be strong or weak and the boiling be for a longer or shorter period, the loss in weight, even for raw halbutai, is about the same.

Arthur E. Cramer, 60 years in the business of manufacturing, printing, and dyeing silks, testified that after drying out he submitted official Exhibits 1 and 2 to a boiling test for an hour in the usual solution of soap and water; that he then passed the samples through alcohol to remove any oil that might remain in the fabric, and then through an acid to remove any alkali which might have been absorbed from the water, and after drying and reweighing he found that there was practically no loss of weight.

Albert Blum, a dyer and finisher of silks, at present connected with the United Piece Dyeing Works at Lodi, N. J., testified that under his supervision official Exhibits 1, 2, 3, and 4 were weighed *without drying*, then boiled for one-half hour in the ordinary boiling-off solution used by his concern for the degumming of silk, dried by the hot-air method, and weighed again with the following results:

	Before boiling off.	After boiling off.	Loss.	Per cent.
	Grams.	Grams.	Grams.	
Exhibit 1 .....	1.650	1.605	0.045	2.73
Exhibit 2 .....	4.078	4.058	.020	7.49
Exhibit 3 .....	3.434	3.380	.054	1.57
Exhibit 4 .....	5.399	5.314	.085	1.57

John P. Cheney, a chemist acquainted with all the processes of dyeing and printing silks and employed for 17 years by dyers and printers of silks, testified that after drying out he boiled official Exhibit 2 in water with 1½ per cent of soap as compared with the weight of water, and after drying again found that the loss of weight was 0.96 per cent. He stated that silks not dried out before testing contained from 6 to 10 per cent of moisture, in which he is confirmed by Epprecht, Schoen, and Cramer. He also declared that by repeated boilings one might get a loss each time, but that he did not believe it would be gum. He thought such additional losses would be due to action on the fiber itself, and in this he is confirmed by Huber, a Government witness, and to some extent by the importers' witness Arnold, who, in giving a reason for not boiling the samples longer than two hours, says:

You simply take away from the quality of the silk if you boil it further. I mean take away the luster—take away from the general appearance.

On this state of the evidence, even if it be accepted that more than a 5 per cent loss of weight on a boiling test indicates a silk "in the gum" rather than a silk "boiled off," as decided in *H. Mendelson &*

Co. v. United States (154 Fed. Rep., 33); even if it be assumed that none of the loss of weight found by Arnold was due to moisture and all of it was caused by gum removed, the importers have failed to show such a loss by a preponderance of evidence. If we deduct at least 6 per cent on account of moisture from the original weights found by Arnold, the results which he obtained are more favorable to the Government than those ascertained by some of the Government witnesses, and the importer is left without any proof whatever that the silks on test lost 5 per cent or more in weight. It is true that, due to the different percentages of soap used in these tests, the different periods for which the samples were boiled, and the different sizes of the samples tested, there were slight differences in the results achieved by the several Government witnesses who tested the samples. As all the tests for the Government, except that made by the Government chemist, seem to have been made, however, for the periods adopted and with the solution customarily used by the several manufacturers and converters of silk in the usual course of business, each of those tests was entitled to fully as much credence as that made by the witness for the importers, which had nothing more to recommend it than that it was made under the conditions which obtained in his business.

Again, manufacturers, converters, dyers, and printers of silk, eight in number, testified that these silks are "boiled off," and nine in number testified that they are ready and fit for dyeing and printing. Two witnesses for the importers, equally qualified with those of the Government, declare to the contrary, and assert that they are not boiled off and they are not fit for dyeing and printing. Therefore, regarding the case from the point of view that the "boiling off" of silks is a process of manufacture and that the question of whether silks are boiled off or not is one purely of fact and of expert knowledge, and assuming for the moment that a silk not fit for dyeing or printing indicates a silk that has not been properly "boiled off," the weight of the evidence is against the importers, and we are obliged to sustain the finding of the board. Whether the decision of the appeal is made to depend on the meaning to be given to the expressions "silks in the gum" and "silks boiled off," or on loss of weight shown by boiling off tests, or on expert testimony as to whether the silks have been actually boiled off and are fit for dyeing and printing, there seems to be no escape from the conclusion that the silks are boiled off and that the assessment of the collector was correct.

The decision of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT and BARBER, Judges, concur. DE VRIES, Judge, having participated in the decision of the board, did not sit.

UNITED STATES v. WATERHOUSE (No. 119).<sup>1</sup>

## 1. MIXED GOODS THAT MAY BEAR DIFFERING RATES OF DUTY.

Dutiable goods imported mixed with other goods subject to another rate of duty or none at all, if practicably separable or if determinable in quantity may, on a levy of duties, be segregated for that purpose.—United States v. Ranlett (172 U. S., 133).

## 2. COAL SLACK OR CULM THAT WILL PASS THROUGH A HALF-INCH SCREEN.

The term "coal slack or culm," appearing in paragraph 415, tariff act of 1897, may not be taken as employed there in a commercial sense limiting the words to coal screened at the mines, but applies as well to coal screened on entry at a port of entry; and coal having been so screened here, the coal slack or culm resulting from the process was dutiable under the act named at 15 cents per ton of 28 bushels, 80 pounds to the bushel.

United States Court of Customs Appeals, March 27, 1911.

TRANSFERRED from United States Circuit Court for Western District of Washington, Northern Division, G. A. 6923 (T. D. 29915).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Thomas M. Lane* on the brief), for the United States.

*W. H. Bogle* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

In the month of September, 1908, the barge *Quatsino*, from Nanaimo, and the barge *Two Brothers*, from Ladysmith, British Columbia, laden with coal, arrived at the subport of Seattle, State of Washington. The *Quatsino* discharged at the Chesley Dock 427,443 pounds of coal, of which 53,625 pounds, or 12.55 per cent, passed through a half-inch screen. At the Wellington Dock there was discharged from the same vessel 805,276 pounds of coal, of which 145,577 pounds, or 18.08 per cent, passed through a half-inch screen *after two screenings*. The *Two Brothers* discharged at the Chesley Dock 4,480,306 pounds, of which 497,857 pounds, or 11.1 per cent, passed through a half-inch screen.

The collector of customs assessed all the coal, independent of whether it passed over or through the half-inch screen, at 67 cents a ton under the provisions of paragraph 415 of the tariff act of July 24, 1897, which in part reads as follows:

415. Coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon, and shale, sixty-seven cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal slack or culm, such as will pass through a half-inch screen, fifteen cents per ton of twenty-eight bushels, eighty pounds to the bushel. \* \* \*

The importers protested that a portion of the coal was not assessable at 67 cents per ton, but that it was dutiable at 15 cents per ton as

<sup>1</sup> Reported in T. D. 31452 (20 Treas. Dec., 588).

"coal slack or culm such as will pass through a half-inch screen." The Board of General Appraisers held that that part of the importation which passed through a half-inch screen on a *single screening* was coal slack assessable at 15 cents per ton and directed the collector to reliquidate the entries accordingly. The Government appealed.

In coal mining, the coal is generally either shattered in the bed or seam by blasting or broken up by undercutting. It is then dislodged by picking or by some mechanical process and finally shoveled or otherwise loaded into small cars for transportation to the surface. From these processes in coal production it necessarily follows that the coal is broken into pieces varying in size from large chunks to small bits and that mixed with the coal as it comes from the mine is a percentage of coal dust, dirt, and generally slate or other rock more or less reduced in size. The larger pieces of foreign material, as far as may be practicable, are removed, and what remains is ordinarily screened at the mine for the purpose of securing the merchantable coal. At most mines not less than two screens are used, one with a 2½-inch or 3-inch aperture and one with a half-inch aperture. The coal which passes over the larger screen is known as lump coal and that which passes through it but fails to pass through the smaller screen is called nut coal. Some mines use a third screen, which catches a size of coal known as pea coal. But whether two screens or more than two screens are used, that which passes through the screen with the smallest opening is known as "slack" or "mine slack" and is made up largely of pieces of coal of undesirable size, coal dust, dirt, particles of slate, or other matter.

From the testimony of the witnesses it appears that this slack or mine slack is considered as refuse and is thrown on the dump as waste. What use to make of this slack or waste has long been a puzzle, and certainly until very recent years it was not considered commercially available as a separate product. Indeed, there is direct testimony to the effect that even now there is but little trade in mine slack, and that as a distinct entity it is rarely imported. At the present time, when sold at all, mine slack brings a small price, say from 25 cents to 50 cents a ton f. o. b. at the mines of British Columbia and 65 cents to \$1.50 a ton at Seattle.

After the screening of the coal, that which has passed over the larger screens is carried to the bunkers and thence by chutes or conveyors is shot into vessels or cars for transportation to market. The screening of the coal at the mines, the carrying of the same to the bunkers, the loading of it into vessels or cars, the motion of the vessel or cars on the voyage or journey, and the shock and friction caused by unloading at the point of destination to some extent again breaks up the coal and develops from 12 to 15 per cent of coal dust or dirt, small pieces of coal, and probably other matter which will pass through a half-inch

screen. This is the product which has given rise to the present controversy, the Government contending that it should be assessed for duty at 67 cents per ton as coal, and the importers insisting that it should be classified as coal slack, dutiable at 15 cents per ton. The Government's contentions in support of its claim may be reduced to two. First, that only mine screenings are commercially known as "slack," and that screenings developed by other than mining operations are not known to the trade as "slack," but as "screenings," or as "steam coal." Second, that "slack" must be imported *as such*, and that the fine particles which are incident to all importations of lump coal in bulk can not be segregated and given a rate of duty different from the main importation.

William E. Pearce, in the coal business since 1897; C. R. Claghorn, in the coal business since 1884; and Dexter Shoudy, wholesale dealer in coal for 17 years, witnesses for the Government, testified that only mine screenings were known as "slack" and that screenings made at destination were known to the coal trade as "screenings." As against this, however, we have the testimony of two other Government witnesses, Lee P. Ketcham and John William Bullock. Lee P. Ketcham, in the coal business for 15 years, responding to a question as to whether "slack" was not a term used only in and about mines and "screenings" the term used in the retail trade, testified that *both* terms were used in the retail trade. John William Bullock, 7 years in the coal business, testified as follows:

Q. According to your experience, how much screenings, on the average, of the size just mentioned, would be found in any carload of bituminous coal? What percentage would be found?—A. Of slack, do you mean?

Q. Of screenings.—A. Do you mean if weighed here?

Q. Weighed at the point of destination—how much per cent?—A. Ten per cent.

Q. You would consider, then, that 10 per cent would be the average amount for merchantable coal?—A. Yes. On the large ton of 2,240 pounds it figures about that we get 2,000 pounds of coal. There would be about 240 pounds of screenings.

Q. What do you mean by the term "slack?" Is that the name you apply to the 240 pounds of refuse that you find in this ton of coal on its arrival at destination?—A. I mean by slack all the small coal that goes through the screens at the bunkers.

Q. Do you say that the term is applied to the small coal taken out at destination by screening? Is that a slip of yours or do you use the term advisedly?—A. Well, all the small coal that comes from the screen—we call that slack or waste—generally.

Q. The small coal that passes through a half-inch mesh here, do you call that slack?—A. Yes.

Q. Is that the term generally understood in the trade as covering that product, or is it not screenings?—A. It is the screenings.

Q. Then why do you use the term slack?—A. Some call it slack and some call it screenings. Some use one term and some another. The two terms are used interchangeably.

In view of this testimony and of the fact that none of the witnesses pretended to say that there was any trade understanding of the word

“slack” at or before the time it was used in the statute, we think that the Government has failed to make out that the word “slack” is a commercial designation or that it has a definite, uniform, or general trade meaning as distinguished from its ordinary signification. We are therefore remanded to the common meaning of the word, and that we find to be, according to the dictionaries, as follows:

Webster’s International Dictionary:

*Slack*.—Small coal; also coal dust; culm.

Standard Dictionary:

*Slack*.—A small coal; coal dirt or screenings.

Century Dictionary:

*Slack*.—The finer screenings of coal; coal dirt; especially the dust of bituminous coal. *Slack* is not considered a marketable material, but may be, and is more or less, used in making prepared or artificial fuel.

Murray’s Dictionary:

*Culm*.—Soot, smut. Coal dust, small or refuse coal, slack. Applied to the slack of anthracite or stone coal from the Welsh collieries, which was in common use for burning lime and drying malt.

Worcester’s Dictionary:

*Slack*.—Small coal; coal broken in parts smaller than the size of an egg.

Analyzing these definitions and reconciling them one with the other, it is evident that the small coal, coal dust, and coal dirt screened from the larger material is “slack,” and that it was so considered by the Treasury Department seems clear from its decisions which, by the way, did not question the meaning of the word, but held to the position that “slack” could not be permitted to enter at the lower rate when it was not imported as “slack” and came in mixed with the lump or other coal of the general cargo. (See T. D. 604, T. D. 667, T. D. 2363, and T. D. 6225.) None of the definitions, except possibly that of Murray, even inferentially confines the term “slack” to mine screenings. Undoubtedly “slack” was *originally* a term invented by miners to designate the screenings resulting from mining operations—the screenings which were cast aside as unmarketable waste and refuse. In time, however, the word seems to have had such a general use as to have found its way into the dictionaries with a meaning which distinguished coal proper from coal screenings irrespective of the place of their production. In other words, screenings, whether made at the mines or elsewhere, being similar in appearance and apparently of the same general composition, the popular mind quite naturally applied the same name to both.

That Congress used the word in its dictionary rather than in its mining sense appears to be borne out by the fact that when it was first used in a tariff law, about 40 years ago, the utilization of “mine slack” was still a problem, and its importation as a separate article must have been commercially impracticable. In fact, counsel for the



Government, making his deductions from cases cited and speaking of the products known as "slack" or "culm," says:

They are so nearly worthless as they fall through the screens that they are not regarded as "coal" under royalty agreements in leases and grants of coal lands.

A product so useless at home could hardly have engaged the attention of Congress as a likely article of importation from abroad. In our opinion what *did* engage the attention of Congress was the "slack" which came into the United States with "run of the mine" and other importations of coal. The fact that such slack, an inferior coal, if coal it could be called, was compelled originally to pay the same duty as the superior commodity probably gave rise to complaints which finally brought about the legislative discrimination between the coal which passed over a half-inch screen and the coal, coal dust, and dirt which went through it.

The second contention of the Government that slack must be imported as such and that it can not be segregated from importations of lump coal for tariff purposes is to some extent answered by what has already been said. In our opinion, Congress, at the time it provided a low duty for "slack," never contemplated that it would be brought in as a separate, distinct article of commerce. The lawmaking power was confronted, we think, not with the possible commercial availability at some future time of "slack" as a distinct article, but with the plain, common, practical business proposition that "slack" was a necessary incident to the importation of both "run of the mine" coal and screened at the mine coal, and that the importer was virtually penalized for its presence by paying duty on it as coal. Congress, therefore, we believe, fixed a duty of 15 cents per ton on slack coal as a relief measure and fully intended that coal and slack coal should be separately assessed and admitted at different tariff rates.

Counsel for the Government, however, insist that for nearly 30 years the Treasury Department ruled that no such segregation could be made and invokes as legislative confirmation of that construction the substantial reenactment in the tariff act of 1897 of previous provisions for "slack." In May, 1870, in July, 1875, and in March, 1884, the Treasury Department did so rule and virtually held that slack was not entitled to the lower rate unless it came in unmixed appreciably "with other coal" and was shipped and invoiced from the foreign country as "slack." In February, 1893, the Board of General Appraisers (T. D. 13816) approved the ruling of the Department and held that—

Congress in providing for coal culm in the present act had knowledge of the interpretation placed upon the language of prior statutes by the Treasury Department relative to bituminous and culm coal, and gave legislative sanction to such a construction of the statute by the choice of language contained in paragraph 432, N. T.

In June, 1900, the board in Abstract 1800 (T. D. 25361) held directly to the contrary. In that case the segregation of the importation was

permitted and the collector was directed to classify a part of the cargo as slack or culm. An appeal having been taken from this decision, it was reversed by agreement of the parties on June 15, 1909. The present case was decided on July 16, 1909, and held to the views declared in T. D. 25361. On January 17, 1905, the board in Abstract 4457 (T. D. 25991) and in the Bond case, Abstract 4458 (T. D. 25991), again held that the importation was segregable and that the slack found was dutiable at 15 cents per ton. The Bond case was appealed to the Circuit Court for the Southern District of Texas and that court affirmed the decision of the board. The following is the opinion of the court:

**BURNS, District Judge:** This case arises upon petition to review the action of the Board of General Appraisers in sustaining the protest of the importer against the assessment of duty upon certain bituminous coal, imported through the port of Galveston on the 6th day of September, 1904.

Entry was duly made of 175 tons, described as "surplus bunkers" and invoiced as bituminous coal; duty thereon was assessed under paragraph 415 of the tariff act of July 24, 1897 (c. 11, sec. 1, Schedule N, 30 Stat., 190; U. S. Comp. St., 1901, p. 1674), at 67 cents per ton; and the entry was liquidated in accordance therewith. This action upon the part of the collector of customs was but the exercise of sound discretion, and he was, in the light of the Treasury decisions, without the alternative to give the matter other direction. The importer contends that 35 per cent of said coal is found to be "slack or culm," and under said paragraph 415 subject to duty at 15 cents per ton. The acting appraiser makes the following return:

I took a fair representative sample of 113 pounds, used a half-inch screen, and with the following result:

	Per cent.
Slack, 40½ pounds .....	0.35481
Lump, 72½ pounds .....	.64159

Petitioner contends that a fair interpretation of the tariff clause relating to the duty upon bituminous coal has no application to slack or culm, where the latter is a part of and not segregated from the general cargo; that, to make the rate of 15 cents per ton available to the importer, the slack or culm must be an individual importation in the sense that it must be distinct, separate, and not confused and intermingled with bituminous coal carrying a higher rate of assessment; and that, not being so separated and segregated, the higher rate should attach. The contrary view is announced by the Board of General Appraisers. It is found as a fact that of the coal in question 35 per cent thereof is what is commonly known as "slack;" and upon the test, made, so far as this record speaks, in a fair and proper way, there appears to be no difficulty upon the part of those charged with the assessment and collection of the duty in ascertaining the proportion which the slack bears to the lump, the part to the whole.

Hence it follows that, if a correct result can be had by the use of scale and screen, the object and purpose of the law has been attained—the quantity of each grade or class ascertained. And, this being so, the law will neither require nor invite the importer to perform an act of separation, useless in result and burdensome in cost, when, as in this case, it appears that the quantity of coal and slack can be estimated and fixed by the weighing of a single tub.

The action of the board should be in all things affirmed, with directions to the collector to reliquidate the entry in accordance with the views here announced, and the decree will so provide.

From these decisions it would seem that the tribunals charged with the duty of reviewing customs classifications have not considered that the act of 1897 was confirmatory of the Treasury construction touch-

ing the nonsegregable character of coal importations and that the interpretation of the statute was not foreclosed by administrative practice. Indeed, a definite duty having been fixed by law on a definite article, it is extremely doubtful whether mere administrative practice in the absence of statutory authority can attach to it a higher rate simply because it is mixed with other merchandise from which it is admittedly separable and for which separation the law itself seems to have made provision.

That dutiable goods, specifically named, coming in mixed with others bearing another rate of duty or entitled to free entry and practicably separable can be segregated seems to have been finally decided in the case of *United States v. Ranlett* (172 U. S., 133). In that case, so far as examined by the customs examiner, from 20 to 25 per cent of American bags entitled to free entry came in mixed with 75 to 80 per cent of foreign bags which were dutiable. Due to this mixture of dutiable and nondutiable bags the appraiser reported all the bags as dutiable, and the collector so assessed them. The Supreme Court decided that one-fourth of the duties paid should be refunded. Prior to the *Ranlett* case the principle of segregation therein enunciated seems to have been recognized both by the board and the courts. See *United States v. Brewer* (92 Fed. Rep., 343); *Weil v. United States* (115 Fed. Rep., 592); *United States v. Helmrath* (135 Fed. Rep., 912); *United States v. Myers* (140 Fed. Rep., 648). The case of the *United States v. Myers* is of especial value as showing the judicial tendency to permit of the assessment of mixed goods carrying different rates of duty. In that case wood pulp subject to a countervailing duty was mixed with wood pulp which was not subject to such duty. The court, affirming the Board of General Appraisers, held that inasmuch as the percentage of it subject to countervailing duty could be established, although the pulp could not be segregated, separate duties might be imposed.

The argument that the segregation of the importation and the assessment of the screenings at 15 cents per ton really amounts to a damage allowance for coal injured during the voyage by loading and unloading is not well founded. Congress, recognizing that slack would be a necessary result and constitute no inconsiderable part of every importation of coal, provided for its segregation and imposed upon it a different rate of duty. If "slack" had not been named and provided for, and if Congress had not indicated the means by which its quantity could be determined, the contention that slack was really damaged coal and that no allowance could be made for it might be entitled to serious consideration.

Duties should be reliquidated as directed in the decision of the Board of General Appraisers, which is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

**STRAKOSH v. UNITED STATES (No. 143). RICHARD v. UNITED STATES (No. 144).<sup>1</sup>****1. A SELLER'S DECLARATION AS TO THE CHARACTER OF GOODS SOLD BY HIM.**

An attested declaration by a foreign dealer in the goods that the merchandise was manufactured from an article produced in the United States will not be admitted to control a case presented by the evidence.

**2. VALUE IN CHIEF—ALIZARIN ASSISTANT.**

Where no proper conclusion can be drawn from the evidence as to what in fact was the component of chief value in an article, no attempt to classify the article according to its component of value in chief will be made, and the finding of the Board of General Appraisers will be affirmed.

United States Court of Customs Appeals, March 27, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21483 (T. D. 29877).

[Affirmed.]

*Comstock & Washburn* (Albert H. Washburn and George J. Puckhafer of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

In these two cases the merchandise imported consisted of certain oils, and in each case it was returned by the appraisers as alizarin assistant. Duty was assessed at 30 per cent ad valorem under paragraph 32 of the act of 1897, which reads as follows:

Alizarin assistant, sulpho-ricinoleic acid, and ricinoleic acid, by whatever name known, whether liquid, solid, or in paste, in the manufacture of which fifty per centum or more of castor oil is used, thirty cents per gallon; in the manufacture of which less than fifty per centum of castor oil is used, fifteen cents per gallon; all other alizarin assistant, not specially provided for in this act, thirty per centum ad valorem.

The importer protested against the classification and assessment of the collector, alleging in his protest upward of twenty different claims in the alternative as ground of dissatisfaction. The board in its decision, while criticizing the protest in form, examined the case on its merits, and overruled the protest upon the ground that there was nothing in the testimony offered on behalf of the protestants to show under which of the many paragraphs named in the protest the merchandise should be classified or whether it should be held to be dutiable at one of the rates claimed or admitted free of duty, at the same time holding that the evidence established the fact that the article imported was not an alizarin assistant.

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<sup>1</sup> Reported in T. D. 31453 (20 Treas. Dec., 590).

The case is brought here for review, and an attempt is made in this court to point out that the importation in question is dutiable under section 6 as a nonenumerated manufactured article. Section 7 of the act contains the provision that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value. It is sought to avoid the application of this section and to bring it within section 6 by applying the doctrine of the case of *Hartranft v. Sheppard* (125 U. S., 337). That case involved the dutiable classification of quilts composed of cotton and eider down, eider down being of chief value. The court said:

Quilts are nonenumerated manufactured articles composed of two or more materials. Eider down is on the free list. As eider down is the component material of chief value in the quilts involved in this suit, and that is free, it follows that they are manufactured articles not provided for, and therefore chargeable with the duty of twenty per cent ad valorem under section 2513. \* \* \*

This section is the prototype of section 6 of the act of 1897.

But we encounter an obstacle in applying the case cited to the present case. The evidence in this case consists of testimony showing first that the importation is not an alizarin assistant; secondly, that it is composed in large part of petroleum. The analysis in fact shows it to contain 71 per cent of petroleum. It also shows the presence of rosin, 8.42 per cent, combined fatty anhydrides, 8.98 per cent, sodium oxide, 1 per cent, and sulphuric oxide, 1.56 per cent. The declaration made before the consul states that to the best of the knowledge and belief of the declarant, the importation described in the invoice was manufactured from crude petroleum produced in the United States of America, and the declaration of the seller of the goods, attested by the United States consul, that the lubricating oil was manufactured from crude petroleum in the United States of America. These declarations can not be admitted to control the case made by the evidence. See *Prosser v. United States*, *supra*, p. 29 (T. D. 30850). And the evidence shows that the product also contains the rosin and other ingredients above mentioned. It is not, therefore, a product wholly of petroleum, and there is no evidence in the record which shows the relative value of the several ingredients of which the importation is composed. It is impossible, therefore, for us to say that it is composed of petroleum of chief value, and thus bring the case within the case of *Hartranft v. Sheppard*, *supra*. This being the case, it must be held that the importer has failed to show the paragraph under which the article is dutiable, and for this reason the decision of the Board of General Appraisers must be *affirmed*.

SMITH, BARBER, DE VRIES, and MARTIN, Judges, concur.

UNITED STATES *v.* SEATTLE BREWING & MALTING CO. (Nos. 263 and 264).<sup>1</sup>

1. SAMPLES FOR TESTING SELECTED BY THE GOVERNMENT.

Apart from any question of the right of the importer to challenge as unfair the quantity or condition of samples of merchandise selected by the Government for test purposes, where officials charged with the responsibility of assessing and collecting duties take such samples of an imported commodity as they deem necessary to insure a proper test of the goods in conformity to law and the regulations of the Treasury Department, no fraud being alleged, the Government will not be permitted here to challenge as unsatisfactory the quantity or condition of the samples so selected.

2. SAME—THESE SAMPLES MAY BE RELIED ON BY THE IMPORTER.

To sustain the burden of showing a collector's assessment erroneous, it is not incumbent on the importer to preserve samples of his importation for a possible future use in litigation; and he may rely, if he chooses to rely, on the sufficiency of the samples selected by the representatives of the Government.

3. BROKEN RICE—WHERE AN EXAMINATION DE NOVO AS TO THE PROPER RATE OF DUTY IS IMPOSSIBLE.

In the case at bar there may have been insufficient samples before the court below, thus making it difficult, if not impossible, to determine with precision just what proportion of the consignment of broken rice was dutiable at a higher rate and what at a lower rate, yet the court was able to reach and did reach a conclusion substantially correct, and its judgment is accordingly affirmed (*United States v. Ranlett*, 172 U. S., 133).

United States Court of Customs Appeals, March 27, 1911.

TRANSFERRED from United States Circuit Court of Appeals, Ninth Circuit, Abstract 13152 (T. D. 27674) and Abstract 14032 (T. D. 27824); 175 Fed. Rep., 125, 128 (T. D. 30341).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Frank L. Laurence* on the brief), for the United States.

*Comstock & Washburn* (*Albert H. Washburn* of counsel) for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The Seattle Brewing & Malting Co. imported by the vessel *Hyson* at the port of Seattle, June 2, 1904, 1,689 bags of broken rice, containing approximately 370,000 pounds, commonly known as "brewers' rice," and by the vessel *Tremont* at the same port on the 9th day of August, 1904, 2,328 bags, containing approximately 490,000 pounds of the same kind of rice, all of which it is conceded was dutiable under paragraph 232 of the tariff act of 1897, the pertinent provisions of which are as follows:

232. Rice, cleaned, two cents per pound; uncleaned rice, or rice free of the outer hull and still having the inner cuticle on, one and one-fourth cents per pound; \* \* \* rice broken which will pass through a sieve known commercially as number twelve wire sieve, one-fourth of one cent per pound. \* \* \*

<sup>1</sup> Reported in T. D. 31464 (Treas. Dec., 592).

At the time these importations were made there was in force a regulation of the Treasury Department providing that the wire used to form the meshes of the No. 12 wire sieve mentioned in the quoted paragraph should be No. 24 brass wire, either Stubbs or Birmingham gauge (T. D. 22528, T. D. 22680). The diameter of this prescribed wire is 0.016 of an inch.

The *Hyson* importation was first assessed at one-fourth of a cent per pound, no test with any sieve apparently having been made by the collector or his subordinates, and the merchandise liquidated accordingly. Later and within some 60 or 90 days a Government examiner tested a sample of this importation with a sieve, and upon the basis of such test duty was assessed on  $81\frac{1}{4}$  per cent thereof at the rate of 2 cents per pound and on  $18\frac{3}{4}$  per cent thereof at one-fourth of a cent per pound, and reliquidation had accordingly. There is no direct evidence as to the gauge of the wire in the sieve used in making this test. A protest and appeal from this reliquidation was made on the 28th day of September, 1904.

A sample of the rice, weighing about 11 ounces and which was certified by the examiner as a representative sample of the rice, was sent with the papers in the case to the board. It appears that this sample was obtained in the following manner: About 40 bags of the importation were opened and a handful taken from each; the amount thus obtained was all put in a bag and mixed and from it the sample sent to the Board of General Appraisers was taken.

The board in its decision, dated December 29, 1906, stated that the importers had not introduced any evidence in support of their protest, and that a careful test made by the board of this sample showed that 24 per cent thereof passed through the standard No. 12 sieve in use in the appraisers' office at New York. The gauge of the wire of this sieve is not stated, but may be presumed to be that required by the regulations then in force.

The board held that this sample was inadequate to determine the proportion of broken rice in the importation. The importers in their protest, which was sworn to, claimed that this sample was not a sample of the rice covered by the importation, but was an entirely different grade and quality. The board, because of this claim and because of its finding that the sample was inadequate in amount, said in substance that it would hardly be justified in finding in favor of the importers that the difference between the amount passing through the sieve in New York and the amount assessed by the collector as broken rice, which would be  $5\frac{1}{4}$  per cent (but is stated to be  $3\frac{1}{4}$  per cent in the printed case), should be classified at the lower rate, and further, that as the case stood the findings of the customs officers had not been successfully assailed and overruled the protest.

The *Tremont* importation was assessed at the rate of 2 cents per pound. The protest was filed September 2, 1904. It appears that one sample thereof was taken, composed of specimens from several places in the cargo, but from how many bags or what amount was taken the record does not show.

This sample was tested by the collector or his subordinates with a No. 12 sieve, the wire of which was 27 gauge. Under the regulations of the Treasury Department the sieve should have been composed of 24-gauge wire, as before stated. The 27-gauge wire is 0.006 inch less in diameter than the 24-gauge wire, and as a No. 12 sieve concededly contains 12 meshes or apertures to the inch, it is obvious that the mesh in the sieve used in testing the rice was larger than it ought to have been to comply with the regulations of the department, and equally obvious that this would result in a greater amount of rice passing through the sieve used in making the test than would have passed through it had the regulation sieve been used. The test as made resulted as follows: Seventy-six per cent of the sample passed through freely, and by shaking and rubbing the rice continuously until it seemed apparent that no more would go through the sieve, the total amount passing through was increased to 87 per cent of the sample tested. Notwithstanding this test, duty was assessed by the collector at 2 cents per pound, as before stated, upon the entire importation. The collector apparently made such assessment in good faith, relying upon what he deemed the controlling effect of certain court decisions. He states in his letter, transmitting the protest to the Board of General Appraisers, that he had since the liquidation been advised by the Secretary of the Treasury that only the rice which would not pass through the sieve should be held for the higher rate of duty.

With the papers in the case a sample of the importation was transmitted by the collector to the Board of General Appraisers, and it also appears that he sent another sample, by express, to the board, pursuant to the instructions of the Treasury Department, all in the latter part of 1904. Evidence was taken before the board. One of the samples sent to the board, as before stated, and which weighed a little less than a pound, was tested by the examiner of rice for the port of New York. He found that 33½ per cent of this sample would pass through the regulation sieve. The importers contended before the board that the samples were too small in order to determine therefrom the proper classification of the importation, with which contention the board agreed, and, there being no other evidence upon that question, the board held, in view of the rule that the burden was upon the importers by a fair preponderance of evidence to show what proportion of the rice was dutiable at the lower rate, that the protest must be overruled, although it said that "with some regret" it reached that conclusion.



Appeals in both cases were duly taken by the importers to the Circuit Court for the Western District of Washington, and the papers in the cases with the official exhibits were seasonably forwarded to the clerk of that court.

Such proceedings were had in each case in said circuit court that further evidence was taken by way of deposition, by both parties, at Seattle on the 20th day of March, 1909. This evidence, so far as is material here, relates to an examination on the 17th day of March, 1909, of the official samples of these importations by three witnesses on behalf of the importers. These witnesses testified that they tested the official samples in each of these cases by ascertaining what percentage thereof would pass through such a wire sieve as was prescribed by the said Treasury regulations and gave the results of such tests.

So far as the record discloses no witness on behalf of the Government tested these samples after the cases reached the circuit court, although no reason appears to exist why it could not have been done if deemed advisable.

The circuit court upon the evidence above referred to found that as to the *Hyson* shipment 43 $\frac{2}{3}$  per cent of the official sample passed through said regulation sieve, and thereupon adjudged that 43 $\frac{2}{3}$  per cent of that importation was dutiable at the rate of one-fourth of a cent per pound and the remainder at the rate of 2 cents per pound. That as to the *Tremont* shipment 47 $\frac{1}{4}$  per cent of the official sample passed through said regulation sieve, and thereupon adjudged that 47 $\frac{1}{4}$  per cent of that importation was dutiable at the rate of one-fourth of a cent per pound and the remainder at the rate of 2 cents per pound.

In the *Tremont* case the court, in part, said:

There is manifest injustice in the assessment of duty on the importation which is the subject of litigation in this case, so much so that the decision of the Board of General Appraisers overruling the importers' protest expresses regret. \* \* \* At the time of entry the collector tested samples of the rice, using a No. 12 sieve made of No. 27 wire, 12 meshes to the inch, and by that test it was found that 76 per cent passed freely and that with persistent shaking and rubbing 87 per cent passed through the sieve. The collector erroneously exacted duty on the entire importation at the higher rate \* \* \* The collector transmitted a report of the test he had made and a sample of the rice which was tested at New York, using a No. 12 sieve made of No. 24 wire, which is the sieve prescribed by an order promulgated by the Secretary of the Treasury. \* \* \* On that test 33 $\frac{1}{2}$  per cent of the sample passed through the sieve. By its decision the board rejected the test made by the collector on the ground that the sieve used was not the sieve which the Secretary of the Treasury prescribed, and rejected the test made at New York on the ground that the sample was insufficient in quantity for an adequate test, and overruled the protest on the ground that the appellant had failed to prove affirmatively that the rate of 2 cents per pound was not applicable to the entire importation. \* \* \*

The Government appealed from the decision in each of these cases to the Circuit Court of Appeals for the Ninth Circuit. Before hearing the cases were duly removed to this court and are here heard together.

The importers in both cases contended before the Board of General Appraisers and before the circuit court that the Treasury Department had no authority to prescribe in its regulations that a No. 12 sieve of 24 Stubbs or Birmingham gauge should be used in testing rice for the purpose of ascertaining its dutiable classification, and insisted that a sieve of larger mesh, which it claimed was commercially known as the No. 12 sieve, should be used instead. This contention, however, is not urged here.

The United States contends, amongst other things before us, that the tests made in the circuit court were inadequate to show the proportion of rice which would pass through the regulation sieve because (a) the tests were improperly conducted; (b) the samples tested were insufficient in quantity; (c) the samples had deteriorated.

Before giving attention to these claims it may be well to consider the circumstances under which the official samples of these importations were obtained and preserved.

There is no claim that the customs officers did not have full opportunity to take such samples as were necessary, and no fault or wrongdoing on the part of the importers in the matter of obtaining the samples or the subsequent care thereof is claimed.

Any deterioration of the samples between the time the last test was made and the time of importation was the result of manipulation and transportation thereof while in the custody of the Government, and if the contention be true that, by drying, the size of the whole or broken kernels had decreased, this had happened by the operation of natural causes over which the importers had no control.

It is also to be noted that it appears from the records of the two cases that the customs officials either at Seattle or Port Townsend retained portions of the samples taken from each cargo after having sent to the Board of General Appraisers the samples which were used before it and subsequently in the circuit court.

When these importations were made there was in force a customs regulation providing that United States examiners and other officers having charge of the examination of merchandise or the assessment of duty thereon should retain samples thereof when returning an invoice at a higher rate of duty than the entered rate, or when for any other reason it seemed probable a protest would be filed, which samples were for the use of the board; that if no samples had been retained, collectors should require the importers filing protests to supply within five days thereafter samples of the merchandise covered by the protests,

which samples should be verified by the examining officer and submitted to the board with the protests. (T. D. 25328.)

From what has already appeared it is plain that the officials concerned in the collection of duty in both these cases took such samples of the merchandise as they deemed necessary to enable proper tests to be made thereof pursuant to law and as they were required by the regulations of the department, and it is clear that these samples which were submitted to the Board of General Appraisers and in due process to the circuit court were portions of the originally selected samples and were believed by the customs officers charged with the duty of procuring proper samples to be fairly representative of the importations.

The learned Assistant Attorney General strenuously insists that these samples which were the basis of the test made by importers' witnesses in the circuit court were as a matter of law inadequate in quantity and character, and that therefore such tests afford no basis for the judgment of that court, and cites many cases to support his contention.

We think an examination of these cases discloses that in each case the objection that the official sample was inadequate was made by the importer. It may well be that an importer can successfully make this objection, when if made by the Government it will not avail.

The United States is a party litigant here; it has ordained that these importations shall pay duty; it has established an executive department whose officers are charged with the responsibility of securing the payment of these duties; that department has prescribed general regulations governing the taking and preserving of samples of the importation in cases like these; in each of these cases such samples have been taken, preserved, and, in due course, tested and passed upon by the various tribunals, the last of which tests forms the basis of the judgment we are now asked to reverse.

In this connection, it must be borne in mind that the Government has not attempted to impeach the tests of these samples made on March 17, 1909, by importers' witnesses, by showing that the results thereof are incorrect, except in one minor detail which involves the weight of some small paper bags and which we think it is unnecessary to further mention; and also that the customs officers at Seattle or Port Townsend retained samples of these importations, which if they had been produced by the Government might have thrown light on some of the issues in these cases.

The Government's position is that the burden is upon the importers to show that the collector's assessment is incorrect and that there is an abiding presumption in favor of the same which the importers have not overcome, and that therefore the collector's action should be affirmed.

As to the *Tremont* shipment, the assessment of the entire importation at the higher rate is concededly unlawful and incorrect, because both sides agree that some portion of the rice would pass through the prescribed sieve, and it would be strange if a due regard for the law should require us to hold that this presumption in favor of the correctness of the collector's action is so potent as to make lawful that which is unlawful and to treat as correct that which is an error. Such a conclusion contravenes good law and good morals and we decline to adopt it. In the circuit court no such claim was made by the United States. The Government there contended that the sample of the *Tremont* importation when tested by the board was truly representative of that shipment.

We think in each of these cases the position which the Government now takes as to the alleged impropriety of the test, insufficiency of samples, and deterioration thereof can not be sustained.

Some duty must devolve upon the Government in cases like these. When samples are fairly taken of the importation we think the importers have a right to assume that they will be preserved by the Government and in due and proper time and manner produced to be used in determining the final rights of the parties. The Government should see to it that adequate samples are taken and preserved, and ought not in cases like those at bar to be permitted to repudiate the official samples.

To sustain the burden cast upon him of showing the collector's assessment erroneous it ought not to be incumbent upon an importer to preserve samples of importations for possible future use in litigation in order to meet the possible danger of the Government denying the adequacy of those it has taken and upon the correctness of which in the first instance it has relied. It is manifestly unfair to an importer to require him to furnish, at the peril of being defeated if he does not, samples of an importation which, in the ordinary course of business, has long ago been consumed.

Apparently one very proper purpose of the department's regulations on the subject of samples, to which we have referred, is to meet just such cases as these, and if they have failed here to accomplish their purpose the Government should not complain.

There is an especial claim made as to the *Hyson* cargo to the effect that because the importers claimed in their protest that the samples submitted by the examining officer were not samples of the cargo, to which protest the secretary of the importers made oath, the importers have ever since been estopped from reliance upon said samples.

This is not well founded. The oath to the protest, which was not necessary, can not operate to give it a higher character than if it had not been attached. Whether sworn to or not it was a protest only. This feature of it was abandoned before the hearing in the circuit

court and we can not discover in what respect the Government's case has been prejudiced by this change of base. It did not change the character or purpose of the official samples and apparently the Government is no more embarrassed thereby than are the importers by the attempt of the Government to discredit the samples themselves.

We are of opinion that the judgment of the Circuit Court for the Western District of Washington is warranted by the law and facts and ought not to be reversed.

There is one other consideration in this case which may be referred to. It appears that the sample of the *Hyson* shipment tested in the circuit court weighed only about 11½ ounces and that of the *Tremont* only about 18½ ounces.

There may be some merit in the claim that these samples are too small to be fairly representative of the importations, and were it possible to procure larger samples, or were the Government in position and disposed to submit samples that had not been subjected to the wearing-away processes which it claims help render those under consideration insufficient, we might hesitate to take the course already indicated, but to prevent any possible miscarriage of justice so shape the procedure herein as to allow another test to be made. That, however, does not appear possible.

Under these circumstances, we are of opinion that the principle established in *United States v. Ranlett* (172 U. S., 133) may well be applied here. It there appeared that it was difficult to say exactly what part of the importations was dutiable and what part was entitled to free entry, and that an examination *de novo* of the question was impracticable. The court said, however, that the evidence before it appeared to afford an adequate basis for a conclusion and proceeded to render a judgment that confessedly did not represent the exact proportion of the importation which was dutiable or free, although approximately so.

There is a manifest injustice here in the assessment in the *Tremont* case as stated in the quoted part of the opinion of the circuit court, and which was recognized by the board, and that ought to be corrected.

On the whole, we are satisfied that although there may have been inadequate samples of the importations before the circuit court so that it was hardly able to determine with entire certainty just what proportions of these cargoes were dutiable at the higher rate and what at the lower rate, yet it was able to and did reach judgments which were substantially correct, and we think the ends of justice are best subserved by affirming the same, and they are hereby *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

UNITED STATES v. BORGFELDT (No. 265).<sup>1</sup>

## 1. SPECIFIC DESIGNATION.

That a specific designation in one paragraph ordinarily controls as against a general description in another paragraph, is true; but where such a phrase as "parts of toys" appears for the first time in a paragraph of a tariff act, effect will be given to what seems to have been a plain intention of the Congress to embody in the new paragraph, for dutiable purposes, all toys and parts of toys, except certain described kinds there enumerated.

## 2. TOY GLASS MAGIC-LANTERN SLIDES.

Glass slides for use with toy magic lanterns are not dutiable under paragraph 107, tariff act of 1909, as glass slides for magic lanterns, but are dutiable under paragraph 431 of that act, as parts of toys.

United States Court of Customs Appeals, March 27, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 7020 (T. D. 30613).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

No appearance for the appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

On the 11th day of August, 1909, George Borgfeldt & Co. imported by the vessel *Maryland* at Baltimore a quantity of glass slides for magic lanterns. The collector classified them for duty as magic-lantern slides under paragraph 107 of the tariff act of 1909, which reads as follows:

107. Strips of glass, not more than three inches wide, ground or polished on one or both sides to a cylindrical or prismatic form, including those used in the construction of gauges, and glass slides for magic lanterns, forty-five per centum ad valorem.

The importers duly protested this classification and the consequent assessment of duty thereon, claiming that these slides were dutiable as "parts of toys" under paragraph 431 of the same act, which is as follows:

431. Dolls, and parts of dolls, doll heads, toy marbles of whatever materials composed, and all other toys, and parts of toys, not composed of china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this section, thirty-five per centum ad valorem.

Evidence was taken before the board on behalf of the importers and the Government. The Board of General Appraisers found these slides were for use in toy magic lanterns and sustained the protest. From this decision the Government has appealed.

The importers have filed no brief and made no oral argument in this court, and the Government's presentation of the case is confined to its printed brief. Therein it is said: "That it is not disputed here that

<sup>1</sup> Reported in T. D. 31455 (20 Treas. Dec., 600).

the slides in question were intended to be used in toy magic lanterns" and that the question in issue is which of the provisions of the two quoted paragraphs are controlling, that is, whether it shall be held that "glass slides for magic lanterns" is a more specific designation of the merchandise in question than "parts of toys, \* \* \* not specially provided for in this section."

These articles are glass slides for one kind of a magic lantern, namely, a toy magic lantern, and they are also either a part of a toy or a toy.

The record before us shows that each of these glass slides usually contains several pictures, generally produced by the use of decalcomania prints and that they are relatively much cheaper than the glass slides which are designed for use in the magic lanterns which are not children's toys; and it appears that on each of such last named glass slides there is ordinarily but one picture which is produced by photographic process.

We assume for the purposes of this case that the importations are parts of toys.

Paragraph 107 is a reenactment of paragraph 110 of the act of 1897, which in turn is identical with paragraph 101 of the act of 1894, so far as relates to glass slides for magic lanterns.

Paragraph 431 is identical with the corresponding paragraphs of the tariff acts, so far as applicable to these importations, as far back as 1890, except that the words "parts of toys" first appear in paragraph 431 of the act of 1909. (1897, par. 418; 1894, par. 321; 1890, par. 436.)

In the case now before us the Board of General Appraisers in effect held that the words "parts of toys" so inserted in paragraph 431 were apparently employed purposely to remove such articles from classification under other paragraphs, the provisions of which had been held applicable to the articles by the board and court, so that an article confessedly a part of a toy for children and fitted for no other purpose should be subject to the same duty as the completed toy.

The Government's argument against this conclusion is that inasmuch as the articles are specifically and without limitation named in paragraph 107 this designation must control notwithstanding the articles are comprehended within the general terms of "parts of toys" in paragraph 431, and refers to decisions of the Supreme Court where the rule is undoubtedly settled that the specific designation rather than the general description must control. This doctrine we recognize.

It must also be held that Congress by inserting the words "parts of toys" intended to enlarge the scope and application of paragraph 431, and force must be given to these words in proper cases. The evident theory of tariff legislation for a long time has been to make special provision for children's toys, and the enlarging of the scope of the toy paragraph to apply to "parts of toys" warrants the conclusion that these words should include articles like those in question unless a con-

trary conclusion is irresistible. The importations are *parts of toys* that are subject to the provisions of paragraph 431. Are they such glass slides for magic lanterns as must be deemed to be referred to in paragraph 107?

The only applicable decision to which we have been referred is one of the Board of General Appraisers (T. D. 22918, decided Mar. 20, 1901) in which paragraphs 110 and 418 of the act of 1897 were considered. The articles there in question were like those at bar, and the board held that it not having been shown they were commercially known as toys, and the words "not specially provided for" being found in paragraph 418 and not in paragraph 110, it must be held that the *eo nomine* designation in the latter paragraph should control and was applicable to the importations.

No consideration in that opinion seems to have been given to the meaning of the words "magic lanterns" and no question appears to have been made whether the term "magic lantern" did or did not apply to toy magic lanterns.

In the Circuit Court for the Southern District of New York, Wheeler, judge, apparently decided January 16, 1900 (but which we do not find to have been published in the Federal Reporter until 1903, see *Borgfeldt v. United States*, 124 Fed. Rep., 457), small slightly made magic lanterns had been assessed by the collector and by the board held dutiable as optical instruments under paragraph 98 of the act of 1894, which relates to spectacles and other optical instruments. The board had found that these magic lanterns were both optical instruments and toys, and held, as paragraph 321 of the act of 1894 relating to toys contained the words "not specially provided for" and paragraph 98 did not contain such words, that the articles were dutiable under paragraph 98.

Upon hearing the appeal Judge Wheeler held that these magic lanterns were not substantial enough to be held to be optical instruments for mature persons, but were toys for children, and should be assessed as such under paragraph 321. This decision of Judge Wheeler does not appear to have been considered by the board in its opinion in T. D. 22918.

Now, in the case before us, the board say that by a parity of reasoning with the case in the circuit court last referred to they reach the conclusion that the provision relating to slides for magic lanterns does not include slides for articles which, within the meaning of the tariff act, are not magic lanterns but toys.

We think there is much force in this reasoning.

Paragraph 107, as well as those associated with the same and which relate to various optical and scientific instruments and parts thereof, would seem to refer to things other than such as are unquestionably toys, and we agree with the board that the term glass slides for magic



lanterns as used in paragraph 107 of the act of 1909 is not intended to refer to glass slides for toy magic lanterns designed for the amusement of children like the articles in this case. We are confirmed in this conclusion by other facts appearing of record in this case and referred to in the decision of the board.

It there appears that there is a class of magic lanterns dealt in and used in the United States which are not known as toys and are not toys and which are sometimes denominated stereopticons. These are used for exhibition purposes and entertainments for adults at theaters and other places of public instruction and amusement. Glass slides used in these magic lanterns are articles of commerce. These slides, as herein before stated, differ from the slides for toy magic lanterns in that there is but one picture upon a slide and this is produced by a photographic process, the result being that the completed slide is relatively much more expensive than slides for toy magic lanterns.

It is well known that these magic lanterns are much more stable in construction than the toy magic lanterns in which the importations in this case are designed to be used, and it follows that the slides themselves could not be held to be either a part of a toy or a toy, but would be dutiable under paragraph 107, as glass slides for magic lanterns.

Such a construction of the two paragraphs, we think, gives full force and effect to the manifest legislative intent and avoids the apparent inconsistency of holding that what is confessedly in fact a part of a toy is not such for tariff purposes.

We think for the reasons above stated that the conclusion of the board should be upheld.

There is another view of the case which perhaps is worthy of mention. In 1894 in the case of *In re Borgfeldt* (65 Fed. Rep., 791), the Circuit Court for the Southern District of New York, Coxe, judge, held in construing the toy paragraph of the act of 1890 that glass slides, which appear from the opinion to be like the ones involved in this case and which contained pictures of animals, birds, etc., for toy magic lanterns imported separately from the lanterns, were toys. In the course of his discussion the learned judge said in substance that the fact that these slides had to be put through a magic lantern did not deprive the slides themselves of the character of toys; that the lantern had to be lighted and the room darkened before the shadow could be thrown upon the wall to make the amusement effectual for children, but that none the less the slides were toys in themselves just the same as drumsticks which are used to make a noise upon the mimic drum are toys, and that it would hardly do to say that the drum was not a toy because there were no sticks with it, or the sticks because there was no drum with them. In this case it was claimed by the Government that the glass slides were dutiable as manufactures of glass. This

decision of Judge Coxe seems to have been acquiesced in by the Treasury Department upon the advice of the Attorney-General. (See T. D. 14969 and T. D. 15081.)

In view of this decision and the acquiescence therein by the Treasury Department, as above stated, and of the opinion of Judge Wheeler in the last Borgfeldt case, it might be urged that these articles are in themselves toys. We do not, however, decide this question.

The judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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BURLINGTON VENETIAN BLIND CO. v. UNITED STATES (No. 268).<sup>1</sup>

1. COTTON LADDER TAPE FOR USE ON VENETIAN BLINDS.

The doctrine of *noscitur a sociis* can not be made to include under paragraph 332, tariff act of 1909, so-called cotton ladder tape employed as a device to raise or lower venetian blinds, and the Congress having apparently with intention assembled in paragraph 349 of that act, for dutiable purposes, amongst other articles, tape made of cotton, will be presumed to have meant cotton ladder tape should be dutiable under the last-named paragraph and it is so dutiable.

2. QUESTION RESERVED.

If the importation in its present form had been shown to be the product of the loom alone, that it had been subjected to no other process, a different question might have been presented; but the testimony as to this being inconclusive in kind the point is reserved.

United States Court of Customs Appeals, March 27, 1911.

APPEAL from decision of the Board of United States General Appraisers, G. A. 7021 (T. D. 30614).

[Affirmed.]

*Brown & Gerry* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation in this case consists of so-called ladder tapes made of cotton. These tapes are used in the manufacture of venetian blinds and are part of the mechanical device by which the slats of the blinds are raised or lowered. The merchandise was assessed for duty as a cotton tape at the rate of 60 per cent ad valorem, under paragraph 349 of the tariff act of August 5, 1909, and was claimed by the importers to be dutiable under paragraph 332 of the same act. These respective paragraphs are as follows:

349. Laces, lace window curtains, and all other lace articles; handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flutings, quillings, embroideries, trimmings, braids, featherstitch braids,

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<sup>1</sup> Reported in T. D. 81466 (20 Treas. Dec., 604).

edgings, insertings, flouncings, galloons, gorings, bands, bandings, belts, beltings, bindings, cords, ornaments, ribbons, tapes, webs, and webbings; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliquéed, or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork, ornamented or embroidered in any manner herein described, in any part thereof, however small; hemstitched or tucked flouncings or skirtings; all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, or of cotton, flax, or other vegetable fiber and india rubber, or of cotton, flax, or other vegetable fiber, india rubber, and metal, and not elsewhere specially provided for in this section, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief value of one or more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the highest rate imposed by this section upon any of the materials or goods of which the same is composed. \* \* \*

332. All articles made from cotton cloth, whether finished or unfinished, and all manufactures of cotton, or of which cotton is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The board, on appeal, overruled the protest and sustained the assessment.

An inspection of the samples before us shows that these ladder tapes are composed of two pieces of fabric of indeterminate length, each about one and one-half inches in width, which are connected at regular distances by pieces of a fabric of much lighter weight, each about two and one-half inches long and about one-fourth of an inch in width. This connection and arrangement give the completed article a ladder-like appearance which probably is the reason why the word "ladder" is used in describing it, although there is no evidence as to that fact.

The only evidence before the board was the official samples and the testimony given by Mr. Crane, the secretary of the appellants, who was introduced as a witness in their behalf. He testified in substance that the official samples correctly represented the importations, that they were imported in the condition shown thereby, that they were solely used for sustaining the wooden slats known in the trade as venetian blinds, that they were woven on a loom by machinery, that so far as he knew nothing else had been done to them, that they had not been embroidered or appliquéed, but were the straight products of the loom, that they were called in trade a cotton ladder tape and were made of cotton. There was no other evidence tending to show how many or what processes were employed in producing the articles, and the source of Mr. Crane's knowledge, if he had knowledge of the methods of production, did not appear.

There was no evidence of commercial designation.

From the opinion of the board it appears that the importers' contention before it was that these tapes were not *ejusdem generis* with the other goods included in the context of paragraph 349, and therefore, under the doctrine of *noscitur a sociis*, were not subject to the duty in that paragraph provided.

The appellants in the presentation of their case in this court rely wholly upon the application of the doctrine of *noscitur a sociis* to exclude the importation from the provisions of paragraph 349, and in that connection urge that this paragraph relates entirely to articles of personal or household use and ornamental in character. They argue that the articles covered by this paragraph are divisible into the five following classes, viz: (1) Laces and lace articles; (2) articles in part of real or imitation lace; (3) various fabrics and trimmings used on wearing apparel; (4) articles embroidered, appliquéed, scalloped, or otherwise ornamented; (5) hemstitched or tucked flouncings or skirtings; and claim the third division in which the word "tapes" is found is devoted wholly to articles used on wearing apparel, and consequently that a tape used solely for mechanical purposes, as in the case at bar, is excluded therefrom and becomes dutiable under paragraph 332. We think this argument is fallacious.

The third clause of the paragraph, in addition to "tapes," refers amongst other things to cords, nets, nettings, webs, webbings, bands, and bandings, some if not all of which articles are, within common knowledge, quite frequently used for purposes other than in connection with wearing apparel.

There is another cogent reason why the doctrine of *noscitur a sociis* can not be successfully invoked here, which is fully set forth in the opinion of the board. From an examination of the tariff acts of 1897 and 1909 it appears that paragraph 339 of the act of 1897, which is the paragraph corresponding to paragraph 349 of the present act, did not specify beltings, bindings, cords, ribbons, tapes, webs, and webbings. All of these articles when made of cotton were provided for under paragraph 320 of the earlier act at a rate of duty less than that provided in said paragraph 339 for the goods mentioned therein, and paragraph 330 of the act of 1909, which corresponds with paragraph 320 of the earlier act, now contains no reference to said articles except to belting for machinery, nor are we able to find any paragraph in the act of 1909 which relates to the articles so apparently transferred, other than said paragraph 349.

All this leads us to the conclusion that the Congress deliberately transferred tapes when made of cotton from a paragraph containing a lower rate of duty to one containing a higher rate, and there would seem to be no reason why effect should not be given to the logical results of such an act. *Stern et al v. United States* (105 Fed. Rep., 937); *Hiller et al v. United States* (106 Fed. Rep. 73).

As we have already said, the only claim made by the appellants is that by the application of the doctrine of *noscitur a sociis* the articles in controversy are excluded from the provisions of paragraph 349. No claim is urged here that the importation is not tape, and by invoking the defense mentioned the appellants impliedly, at least, admit it to

be tape made of cotton within the common meaning of that word as used in the paragraph and have claimed or shown no commercial designation.

We therefore content ourselves with deciding the precise question raised by appellants' counsel and discussed in their brief.

We are not called upon to determine what the rights of the appellants might have been had the claim been advanced, supported by sufficient evidence, that the article was not in fact tape. The word "tape" ordinarily signifies a narrow piece of woven fabric, and it may not always be clear what articles come fairly within that designation. Obviously if the importations are made from tapes previously manufactured they would, under the first proviso of paragraph 349 when read in connection with paragraph 332, be subject to the same rate of duty as that imposed by the collector. If, however, the importation in its present form is the product of the loom alone and has been subjected to no other processes a different question might be presented. The testimony upon this point is unsatisfactory and does not furnish a basis for a reversal of the finding of the board. We refer to it, however, in order that it may not be understood that such question is concluded by this decision.

The judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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### MARK CROSS CO. v. UNITED STATES (No. 415).<sup>1</sup>

#### SMOKERS' ARTICLES OF LEATHER.

The articles named in paragraph 475, tariff act of 1909, are all related in actual use, and it would be to deny a reasonable and proper effect to that clause in that paragraph, which includes "all smokers' articles whatsoever," if leather cigar or cigarette cases should be classed as leather rather than as smokers' articles, the last being a more specific term, and so leather cigar or cigarette cases are dutiable, not under paragraph 452, tariff act of 1909, but under paragraph 475 of that act.

United States Court of Customs Appeals, March 27, 1911.

APPEAL from decision of the Board of United States General Appraisers, Abstract 23575 (T. D. 30733).

[Affirmed.]

*Walden & Webster* (Henry J. Webster of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Frank L. Lawrence on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

On the 30th of August, 1909, the appellant imported into this country a consignment of cigar and cigarette cases, composed in chief

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<sup>1</sup> Reported in T. D. 31457 (20 Treas. Dec., ) 607.

value of leather, designed to be carried in the pocket or in travelers baggage.

Duty was assessed upon them at 60 per cent ad valorem under paragraph 475 of the tariff act of 1909, which reads as follows:

475. Pipes and smokers' articles: Common tobacco pipes and pipe bowls made wholly of clay, valued at not more than forty cents per gross, fifteen cents per gross; other tobacco pipes and pipe bowls of clay, fifty cents per gross and twenty-five per centum ad valorem; other pipes and pipe bowls of whatever material composed, and all smokers' articles whatsoever, not specially provided for in this section, including cigarette books, cigarette book covers, pouches for smoking or chewing tobacco, and cigarette paper in all forms, sixty per centum ad valorem.

The appellant protested against this assessment, claiming that while the imported articles fell within the general description of smokers' articles, they nevertheless came more specifically within the provisions of paragraph 452, the pertinent part of which reads as follows:

452. Bags, baskets, belts, satchels, cardcases, pocketbooks, jewel boxes, portfolios, and other boxes and cases, made wholly of or in chief value of leather, not jewelry, and manufactures of leather, or of which leather is the component material of chief value, not specially provided for in this section, forty per centum ad valorem. \* \* \*

The protest was heard upon evidence by the Board of General Appraisers and overruled. The appellant prays for a reversal of that decision.

It is conceded that the question is to be decided by application of the rule that the more specific of the two provisions shall prevail, for the imported articles plainly come within the language of each.

Such a question as between paragraphs of rather general application is often perplexing; and its solution may sometimes seem to depend upon the angle of observation. The leather paragraph, however, provides for cases composed in chief value of leather—that is, for all such cases—and it therefore includes not only cigar and cigarette cases so composed, but also all other kinds of such leather cases. The smokers' paragraph provides for smokers' articles only, and would therefore include only such leather cases as are used by smokers—that is, the first paragraph provides for all cases composed in chief value of leather, the second provides only for such cases, so composed, as are used by smokers. Therefore, in so far as these two paragraphs respectively touch upon such leather cases, the first paragraph includes all, and the second only a part; the first is the genus, and the second the species.

The question is, which paragraph deals the more specifically with such cases; and the foregoing statement seems to show that the smokers' paragraph is the more limited, definite, and specific of the two in its relation to this subject matter.

Another consideration suggests itself: The smokers' paragraph provides in terms for "all smokers' articles whatsoever, not specially provided for in this section." Now, all such articles are manufactured

of leather, wood, stone, glass, metal, or some such material. If the materials composing the smokers' articles were to prevail over the use of the articles in determining their classification, it may well happen that very few smokers' articles indeed would remain within the purview of the paragraph. And thereby the obvious and expressed purpose of the paragraph to establish a class of articles by reference to their similar use would be entirely defeated.

It may also be said that the articles included within the leather paragraph are related to each other by their common composition; those included within the smokers' paragraph are related by their common use; and this latter relation seems under the circumstances to be the more distinct and specific method of describing either as a class.

The decision of the board is therefore *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

### UNITED STATES v. ROBERTSON (No. 418).<sup>1</sup>

#### 1. "ROUGH LEATHER" IN PARAGRAPH 451, TARIFF ACT OF 1909.

"Rough leather" as used in paragraph 451, tariff act of 1909, had such a well-established and definite trade meaning before and at the time of that enactment that no change or modification of the meaning by interpretation is permissible.

#### 2. SAME.

Where the hides of the importation had been tanned by prolonged soaking in a running stream, chosen for the purpose because of a peculiar effect that particular water had upon the hides and where the hair of these hides had then been scraped off with knives, and the hides with oil upon them trodden down in barrels, replaced again in the running stream, later to be removed, tightly stretched and pegged on the ground to dry and bleach in the sun, and so made water tight: *Held* this leather, as shown by the evidence, being now ready for immediate use in manufacture, is not rough leather, but leather, rather, not specially provided for, tanned and curried in effect, and as such dutiable at 15 per cent ad valorem under paragraph 451, tariff act of 1909.

United States Court of Customs Appeals, March 27, 1911.

APPEAL from decisions of the Board of United States General Appraisers, G. A. 7042 (T. D. 30720) and Abstract 23746 (T. D. 30828).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*Brooks & Brooks* (*Frederick W. Brooks* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

In the months of November and December, 1909, the appellees, L. F. Robertson & Sons, imported from Japan a quantity of leather packed in cases.

<sup>1</sup> Reported in T. D. 31456 (20 Treas. Dec., 609).

It is conceded that the importation was dutiable, and that the rate of duty was governed by paragraph 451, tariff act of 1909. The following parts of that paragraph contain all the provisions relevant to this case:

Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem.

The importers maintained that the importation was "rough leather," and therefore dutiable at 5 per cent ad valorem. The collector, however, held that the leather was not "rough leather," and that it was dutiable at 15 per cent ad valorem as leather "not specially provided for" in the section.

The importers filed their protest to this decision, and the same was duly heard upon evidence by the Board of General Appraisers. The board held with the importers, that the leather was "rough leather," and the decision of the collector was therefore reversed.

The Government thereupon filed its petition here, together with the record containing the evidence, and also the exhibits, and prays for a reversal of the decision of the board. The issue made by the parties is therefore to be determined by finding the meaning and the application with respect to this importation of the term "rough leather," as used in the paragraph above quoted.

Other questions were raised in the presentation of the case to the board; but it is now conceded that only this one question need be considered and answered, and that it is decisive of the issue.

The counsel for appellees states that so far as he can ascertain, by examination, this is a new provision in the tariff act of 1909, which has never appeared in any preceding tariff enactment. Both parties agree that the term "rough leather" has long been known and used as a trade designation in the leather trade in this country, and each party has called a number of expert witnesses to give its accepted definition. These witnesses are merchants and manufacturers in that line of business, and fortunately they substantially agree as to the correct definition of the term. In fact, there is so little appearance of difference among them that it may fairly be said that the parties have agreed upon the trade meaning of the expression.

Rough leather, as understood by the trade, was such leather as had been tanned and unhaired, and not given any further finishing treatment. It was thus contradistinguished from dressed or finished leather.

The first process, generally stated, in the treatment of hides is to tan them, which also includes unhairing them. Before the hides are tanned they are not called leather at all; when they are once tanned they become leather. When only tanned and unhaired they are rough leather. When such leather is afterwards finished and dressed by



other processes it ceases to be rough leather. This finishing process is generally called currying, and in brief and general terms it may be said that the hides leave the tanner and come to the currier as rough leather, and leave the currier as finished or dressed leather.

The following extract from Spon's Encyclopedia, under title of "Leather," gives a better statement of these distinctions:

Leather manufacture may be broadly divided into two stages; "tanning," in which the raw hide is converted into the imputrescable and more or less flexible material known as "leather," and "currying," in which the leather is further manipulated, and treated with fatty matters, to soften and render it more waterproof, and to improve its appearance. Glove kid and certain other leathers, however, are not tanned at all, but "tawed," or prepared with a mixture in which alum and salt are the most active ingredients; and many leathers can scarcely be said to be curried, although more or less oil is used in the final processes of "finishing" or "dressing."

\* \* \* \* \*

In general terms, the process of currying consists of softening, leveling, and stretching the hides and skins which are required for the upper leathers of boots, and other purposes demanding flexibility and softness, and in saturating or "stuffing" them with fatty matters, not only in order to soften them, but to make them water-tight and to give them an attractive appearance.

The question then is, What point in the processes above described has been actually reached by the importation?

As has been stated, this leather comes from Japan. In that country there is a brook which takes its rise in a silver mine, the water of which seems to have some peculiar properties in its effect upon the hides of cattle. This has resulted in establishing an industry of curing and treating hides in that countryside, not by means of large factories, but rather by the hand labor of individual workmen.

The green hides, with the hair yet upon them, are first submerged in the water of the brook, and are allowed to remain there for two or three months, depending upon the season of the year. After such a period of immersion the hides are taken out of the brook and the hair is scraped or cut off by hand labor, by means of small knives. The flesh side is also scraped or "scratched" by hand, by means of a small tool. The hides are then packed in barrels, two or three to a barrel, together with some "simple oil," and a workman treads and stamps upon them, and kneads them in this manner. After this treatment they are again placed in the brook, this time for only a few days. They are then taken out and tightly stretched and pegged upon the ground, and allowed to remain thus a week or two, "according to the heat," to dry and bleach in the sun.

This is the process as described by the witnesses, and while much of the testimony upon the subject is hearsay, indeed almost necessarily so, yet it seems to be accepted as correct by both parties and no doubt is a substantially true statement of the process. It seems that the water of "the river which flows from the silver mine" has some peculiar chemical properties, for an effort was made to use another

stream, probably near by, for this same purpose and it was unsuccessful. The leather produced by this treatment is soft and flexible; it is white in color; it is imported in entire hides, with the edges untrimmed and the peg holes of the stretching process still in them. Several witnesses who have no personal knowledge of the treatment of the hides in Japan, and who testify as experts from an examination of the leather, say that it must have been also washed with alum. It is also stated as the opinion of some such witnesses that the leather has been split and rolled in order to bring it to its condition when imported, this being expert opinion based wholly upon an examination of the exhibit. These statements are not mentioned as proof of the processes followed in the treatment of the leather, but rather to serve in part as a description of the present appearance and character of the importation itself.

The leather thus produced and imported into this country is largely used here in the manufacture of tips for men's suspenders. One of the virtues for this use is the alleged fact that it does not tarnish the polished metal of the suspenders with which it comes in contact. For this use the leather as imported requires no additional treatment of any kind. The pieces are cut by means of dies from the imported leather, and are ready for use in the suspender.

The importer, Mr. Robertson, says that he sells his imports mostly, if not entirely, to suspender manufacturers, and he also says that one half of all such importations is so used, the other half being used for small wares and in the furniture trade. One Government witness estimates that 75 per cent of such imported leather is used for suspenders, and another says 90 per cent.

The definition of rough leather being given, and the history and description of the importation also, the question recurs whether the term covers and includes the article or not. The witnesses for the importers all testified specifically upon view of the official exhibit that it was in fact rough leather; the witnesses for the Government all testified specifically upon similar view that the exhibit was not rough leather. There were eight witnesses of apparent information, intelligence, and candor on each side.

As has been explained above, the process to which this leather was submitted is peculiar. In the treatment of the hides in Japan there was no tannery in the ordinary acceptation of the term as used in this country, nor were there distinctive curriers. And this is one cause of the confusion and difference between the parties in this case. For where the industries are separately carried on, the trade finds a natural and easy means of determining whether the leather is yet rough or not.

But when the entire process in Japan is summed up, and its effects are measured, and the character and qualities of the leather considered, it becomes manifest that the hides so treated have practically been tanned and curried. That is, they have not only been "converted

into the imputrescable and more or less flexible material known as leather," but they have also been "softened, leveled, and stretched, and have been saturated or stuffed with fatty matters, not only in order to soften them, but also to make them water-tight, and to give them an attractive appearance." That is to say, they have in substance and fact been both tanned and curried; they have not only been converted from hides into leather, but the leather itself has been advanced from its first condition and has become so far finished and dressed as to be now ready for most of its final uses.

As has been stated, one-half or more of such importations goes directly into the making of suspenders. A leather which is so far finished as to be fit in that proportion for its use in manufacture can hardly longer be called rough leather. Some of the witnesses testify that the leather can be used for small wares and furniture without any additional treatment; others that it would require additional processes to fit it for these uses. Probably both statements are partly correct. Nevertheless it may fairly be said that only in exceptional cases does the leather require further finishing to prepare it for any of its final uses. Such a finding makes it impossible to apply the term "rough leather" to it with the definition given to the term by the trade witnesses whose testimony appears in the record. For after all it is the character of the leather itself which must finally determine what its proper classification is.

And even if the leather is not fully finished for every purpose, it is nevertheless so far finished in character as to be effectually taken out of the class of rough leather which, properly understood, is leather that is not finished at all. It is contended by the importers that domestic rough leather, such as illustrative Exhibit A, which plainly is undressed and unfinished leather, is also used in its rough state for some purposes. It is therefore argued that the mere fact that the importation may be used in its present condition ought not to take it out of that class. But the uses made of rough leather, like Exhibit A, are only a few rough uses, such as for valves and washers; and the proportion of such leather thus used is so small as to be almost beneath calculation.

It may furthermore be observed that leather has been prepared by domestic manufacturers to compete with this imported leather in the making of suspender tips. In such cases the effort was made to give the domestic leather the same qualities, except color, possessed by the imported article. Such domestic leather was regarded as dressed or finished.

It also appears that leather similar to the importation has at times been produced in this country. This explanation is given of the process:

The hide is soaked in water, then we put it in the lime to take the hair off, and after the lime was taken off we split the hide and take the grain side and process it in alum, flour and eggs, and a little oil, and it is stamped over in oil or barrels, as

described, until it is soft, and after the stamping is complete this hide is stretched over stretchers to make it soft and pliable and suitable for commercial purposes.

The domestic leather thus produced was recognized by the trade as finished leather.

One other matter should be briefly noticed before reaching a final conclusion. In paragraph 438 of the tariff act of 1897 all of the different kinds of leather named in the present paragraph are made dutiable at 20 per cent ad valorem. Rough leather, however, did not appear there under that name. In the present paragraph these different kinds are separated into two classes, the first being dutiable at 5 per cent ad valorem, the second at 15 per cent.

The following quotation will show the provisions of the act of 1897:

Band or belting leather, sole leather, dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, chamois and other skins and bookbinders' calfskins, all the foregoing not specially provided for in this act, twenty per centum ad valorem. \* \* \*

In the revision of 1909 this is superseded by the following, which is part of the present paragraph:

Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem. \* \* \*

It is contended that "rough leather" as used in the latter paragraph should be construed, *a sociis*, to mean leather no further finished than bands, bends, belting leather, and sole leather; and that such a construction is favored by the history of the legislation and by the context. It is contended that if such a definition were adopted it would include this importation.

Two answers to this contention suggest themselves:

First, the term "rough leather" had such a well-established, definite, and unmistakable trade meaning at and before the last enactment that no modification of this meaning by interpretation is permissible.

Second, as a matter of fact, appearing from the record and the exhibits, the importation is less like the 5 per cent class of leathers and more like the 15 per cent class in character and finish.

These considerations lead to the conclusion that the collector was correct in his classification; that the importation was not dutiable at 5 per cent ad valorem as rough leather, but was dutiable at 15 per cent ad valorem as leather not specially provided for in the section; and the decision of the board is therefore *reversed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

LOEB v. UNITED STATES (No. 69).<sup>1</sup>

## 1. EXAMINATION BY BOARD OF THREE GENERAL APPRAISERS REQUIRED.

The changes made in the law governing appraisements of merchandise at ports of entry, as these changes appear in sections 12 and 13, customs administrative act of 1890, do not warrant the inference that it is unnecessary in reappraisal proceedings for a board of three general appraisers to examine the samples of the merchandise when reappraised.

## 2. SAMPLES IN PUBLIC STORES.

Packages or samples selected by the collector and deposited in public stores are to be deemed as under the immediate continuing control and in the continuing physical custody of the appraiser, the general appraiser, or Board of General Appraisers, respectively, before whom a case may be pending in which these samples have been selected and detached for the purpose of an examination or of inspection and appraisement.

## 3. SAME—EXAMINATION NECESSARY.

Irrespective of the particular designation of the official or officials to whom "a case" is submitted in proceedings to appraise merchandise, it can not be said "the case" has been examined when the exhibits or samples deposited as a part of the case have not been examined; and the statute is mandatory that on appraisement or reappraisal the exhibits or samples shall be examined.—*Erhardt v. Schroeder* (155 U. S., 124; *United States v. Ranlett*, 172 U. S., 132) distinguished.

## 4. WHEN IT APPEARS ALL SAMPLES WERE EXAMINED.

In the case at bar, it being fairly established by the evidence that the number of packages required by law were sent to the public stores for examination and that these were in due course examined by the reappraisal board, their finding must be here affirmed.

United States Court of Customs Appeals, April 3, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6738 (T. D. 28849).

[Affirmed.]

*Curie, Smith & Maxwell* (W. Wickham Smith of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The question here presented is whether the failure of a board of three general appraisers in a reappraisal proceeding to examine the samples designated by the collector under the provisions of section 2901 of the Revised Statutes "for examination" renders the decision of the board void for want of jurisdiction.

It is not made clear by the record exactly when the reappraisal was held, but there is sufficient to determine that it was sometime during the year 1899.

The Board of General Appraisers held that such failure did not invalidate the appraisement.

<sup>1</sup> Reported in T. D. 31479 (20 Treas. Dec., 650).

The conclusion was based largely upon a comparison of section 13 of the customs administrative act of 1890 with section 2614 and 2930 of the Revised Statutes.

Section 2930 of the Revised Statutes, which was repealed by section 13 of the customs administrative act, provided:

SEC. 2930. If the importer, owner, agent, or consignee, of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly.

Section 2614 of the Revised Statutes, pertinent to oaths of appraisers, provides as follows:

SEC. 2614. \* \* \* All other appraisers, and all resident merchants appointed according to law to act as appraisers, shall severally take and subscribe an oath diligently and faithfully to examine and inspect such merchandise as the collector may direct, and truly to report, to the best of their knowledge and belief, the true value thereof.

Section 13 of the customs administrative act, in so far as pertinent, provides:

SEC. 13. \* \* \* If the collector shall deem the appraisement of any imported merchandise too low, he may order a reappraisement, which shall be made by one of the general appraisers, or if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within two days thereafter give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall at once direct a reappraisement of such merchandise by one of the general appraisers. The decision of the appraiser or the one acting as such (in cases where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), or of the general appraiser in cases of reappraisement, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within two days thereafter, give notice to the collector, in writing, of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low, in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision or that of a majority of them shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein. \* \* \*

The board attached a controlling significance to the absence of the requirements under section 13, which appeared in said sections 2930 and 2614, that the merchant appraiser should be a "discreet and experienced merchant \* \* \* familiar with the character

and value of the goods in question," ~~and~~ should "examine and appraise the same," and, of section 2614, providing ~~that~~ all appraising officers, including the general appraiser and the merchant appraiser should "take and subscribe an oath diligently and faithfully to *examine* and inspect such merchandise."

Aside from other considerations later mentioned, we are unable to follow in that course of reasoning whereby the conclusion is reached that because the earlier statute required in express terms that a merchant appraiser familiar with the merchandise should examine the same and there was substituted in lieu thereof a Government official surrounded by no statutory requirement of familiarity with the merchandise, that solely by reason of that change the latter was not required to examine it.

As between the two there was less rational requirement for the merchant appraiser selected because familiar with the particular class of merchandise to examine it, in order to reach a fair conclusion, than there was that a general appraiser of whom no knowledge upon the subject is required by statute should do so. Every rationale argues the contrary.

Nor do we conclude from the general oath of the general appraisers, appointed under the customs administrative act, instead of the special oath of appraisers under section 2614 to "examine and inspect" the merchandise, that thereby the former are relieved of that duty. The sufficient reason for the different oath is apparent from the duties of the general appraiser as prescribed by section 12 of the act, giving him jurisdiction over *both* "appraisement and classification" cases. The latter are appeals from the collector; the former from the appraiser. The collector takes no such oath, and neither he nor the general appraiser is or should be bound to examine the merchandise in classification cases. Hence, such an oath by a general appraiser performing both classes of duties would result in the utmost idle confusion. In the presence of this logical and legal reason, we perceive no inference whatsoever from this change relieving the general appraiser from the duty of examining the merchandise in reappraisement cases.

The method of appointment of former general appraisers, as provided by section 2608 of the Revised Statutes, and of merchant appraisers as prescribed by section 2930 of the Revised Statutes, was changed by section 12 of the customs administrative act, and this is emphasized by the board as supporting their conclusions.

There was substituted in the place of the temporary and skilled merchant in the particular case, on the one hand, and the general appraiser selected without reference to any statutory qualifications, and the collector in case of a disagreement between the others, likewise selected without any statutory qualifications, general appraisers,

whose tenure of office under said section 12 was practically for life and who were selected without any statutory qualifications. The only pertinent significance in these changes, so far as the qualifications of the appraising officers are concerned, which we are able to glean from these changes of law in no wise affects the issue here. It was never required by the law of his selection or of the oath of office of the collector as official arbitrator of reappraisement cases that he should be especially skilled in the merchandise to be appraised or that he should examine the merchandise.

Indeed Congress must have considered that in the appointment of men of high standing and ability, practically for life, whose almost daily duties included the appraisement of every variety of merchandise and contact with the importing trade, the acquisition of such skill in that pursuit and such vast information and knowledge as must be accumulated in the exercise of that function as would in time constitute them equally great experts in every line of that work with any merchant or merchants, however skilled in his particular line. This is the view taken by the Supreme Court of the United States, quoting with apparent approval from the Customs Regulations. *Origet v. Hedden* (155 U. S., 228-237).

Omission of these qualifications of familiarity with the merchandise in appraisers does not, therefore, argue that Congress intended appraisement without regard to the appraisers being or acquiring familiarity therewith, but substituted a better method of such familiarity; and the best method whereby this substituted intelligence could be assured was by constant examination of the goods.

It will aid in an intelligent consideration of the case, we think, to recite as briefly as possible the procedure in appraisements and appeals therefrom to final conclusion.

Section 7 of the customs administrative act of 1890 provides:

SEC. 7. \* \* \* the collector \* \* \* shall cause the actual market value or wholesale price of such merchandise to be appraised. \* \* \*

Appraisement, therefore, in the first instance, is initiated by the collector under section 2901 of the Revised Statutes by "*designating on the invoice*" 1 package of every invoice and 1 package at least of every 10 packages of merchandise "to be opened, examined, and appraised," and that section provides the collector "shall order the packages so designated to the public stores for examination." He then transmits the invoice containing this designation to the appraiser. The local appraiser then makes return of his appraisement to the collector. Section 13 of said act provides that if either the collector or owner is dissatisfied appeal may be taken to a general appraiser. This appeal is taken, if by the importer, by giving "notice to the collector \* \* \* on the receipt of which the collector shall at once direct a reappraisement of such merchandise by



one of the general appraisers." If the importer is dissatisfied with this decision he will "give notice to the collector, in writing, of such dissatisfaction, \* \* \* in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers, \* \* \*." In both cases return of the decision, as stated, is made to the collector.

The locus of the merchandise meanwhile was also provided.

At the time of this appraisalment, and there have been no material changes since, the provisions of statutory law affecting the custody and control of the merchandise itself and in part the methods of appraisalment were sections 2899 of the Revised Statutes and 2901 of the same, which read:

SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

It will be noted that section 2901 of the Revised Statutes requires that after designation upon the invoice of the packages for examination the collector "shall order the package so designated to the public stores \* \* \*."

There was no further requirement until after the creation of the Board of General Appraisers. It will be noted that the statute did not then, nor does any statute at present, require that the packages for examination be sent to any particular appraiser, general appraiser, or Board of General Appraisers. But it seems that Congress deemed, by section 2901, that when the requisite packages were sent to the

“public stores” they were equally available for the purposes of examination by the local appraiser, the general appraiser, and the Board of General Appraisers, and were deemed in their immediate custody for that purpose. That this was true is borne out by T. D. 10355, promulgated November 1, 1890, and which was in effect at the time of the appraisement of this merchandise. That Treasury regulation provided, and at that time the Board of General Appraisers was bound by the regulations of the Treasury affecting reappraisements, that after notice of appeal in a reappraisement case the packages designated by the collector under section 2901 could not be taken from the public stores *without written consent of the general appraiser* having the case pending before him, or, if on appeal to the Board of General Appraisers, of the Board of General Appraisers. That now is and has been the case ever since the organization of the Board of General Appraisers. The inference, therefore, is irresistible that when the packages were sent to the public stores they were under the law expressly provided in the physical custody and immediate control of the appraiser, general appraiser, or board of three general appraisers, respectively, before whom the case was pending, for the purposes of examination, inspection, and appraisement.

As all notices of appeal in reappraisement cases were given and returns made under section 13, *supra*, to the collector, the primary custodian of the merchandise, he was thus advised of their status and control. The statutory delivery of the merchandise to the local appraiser of the packages for examination being the same as that to the general appraisers, and it being admitted that examination by the local appraiser is enjoined by statute and that he does examine them in that status, we can not escape the conclusion that Congress has equally provided by this statute their delivery to the general appraisers available for all purposes of examination.

This conclusion, it seems to us, is fully confirmed by the provisions of section 2901, Revised Statutes, as will be shown later.

The board in this case held that because section 13 of the customs administrative act, which is largely confined to the appellate procedure in reappraisement cases, stated only that the collector, upon notice of appeal, “shall transmit *the invoice and all the papers* appertaining thereto to the board of three general appraisers, \* \* \* which board shall *examine and decide the case* thus submitted,” and made no provision for the transmission of the packages, that the omission was of such significance as to warrant the conclusion that Congress did not intend to require the samples or packages as a part of “the case” as made up on appeal, and quoted the provisions relating to classification cases in support of that view.

We can not concur in this conclusion, in the light of what has been said, and of what is provided by other provisions of the law, for the

reason that the statutes had already provided for the transmission of samples or packages to the board, and when the notice of appeal was filed immediate custody thereof was *ipso facto* surrendered by the collector to the Board of General Appraisers having jurisdiction of the case, and they could not be withdrawn from the custody of the board without their permission. (See T. D. 10355.)

It would have been an idle requirement, after the Congress had provided in section 2901 that certain packages should be sent "to the public stores," and "a greater number should be or *any of the appraisers* deem it necessary," thus not only putting the selected packages, but making the whole cargo subject to their order, to have said anything whatsoever upon the subject of the packages. They were already at the place where they were to be examined or made subject to the order of the appraisers.

Strong confirmation that the Congress in section 13 contemplated that, per force of law, the samples or exhibits were before the Board of General Appraisers in reappraisement cases is had by advertising to the language of section 14, providing for appeals in classification cases. After notice in such cases, there being no other provision of law relating to the delivery of samples or exhibits to the Board of General Appraisers, it is expressly provided:

Upon such notice and payment, the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers.

In this view it can not be said that there is no provision of statute which commands a board of three general appraisers to examine the merchandise, for section 13 says as to the board of general appraisers on this appeal, "which board shall *examine* and decide the case thus submitted." "The case" thus submitted is constituted of the papers sent up by the collector, including, as a statutory part thereof, the invoice, upon which invoice is designated by the collector the packages selected under section 2901 of the Revised Statutes "to be opened, examined, and appraised," and which are then and there in the immediate custody of the board. The packages are expressly referred to and identified by the invoice, marked upon the face thereof by the collector, and they are, therefore, the exhibits which form an integral part of the "case" submitted to the board for decision concerning which it is expressly prescribed in the statute that they shall "examine" the "case" thus submitted.

We do not think it could be said that "a case" submitted for decision, whatever function the deciding official is exercising, can be said to have been "examined" when the exhibits referred to in the documents and which are the real subject of the proceeding have not been examined.

This is particularly true in the light of the injunction provided by Congress in section 10 of the customs administrative act enacted at

the time of the creation of this board that "the appraisers of the United States, and every of them, and every person who shall act as such appraiser, shall \* \* \* by *all* reasonable ways and means in his or their power, \* \* \* appraise" the merchandise.

We have already stated that while the board in this case based its conclusions solely upon the language of section 13 of the customs administrative act, that section provides principally the procedure upon appeal in reappraisement cases.

The duties, limitations, and methods of appraisement of all appraising officers, including general appraisers, are, in part, described in other statutes. Section 2899 of the Revised Statutes, quoted *supra*, providing for the retention of all imported merchandise duly appraised and otherwise found correct; section 2901 of the Revised Statutes, quoted *supra*, providing that the collector shall select certain packages and forward them to the public stores "to be opened, examined, and appraised;" and section 2902 of the Revised Statutes providing for the mode of appraisal by all appraising officers were not repealed, expressly or by implication, by the enactment of the customs administrative act of 1890, of which said section 13 forms a part.

Said sections 2899 and 2901 are uniformly read by the courts in connection with the customs administrative act as not having been repealed by implication.

Section 2902 of the Revised Statutes was not only not repealed, but, in substantially the identical form as it existed before and as it has been construed by the courts for many years, was expressly reenacted and included as section 10 of the customs administrative act.

These provisions are, and uniformly have been, held, together with that act, to prescribe the duties and methods of all appraisers in reappraisement cases.

So, leaving aside consideration of the provisions of the customs administrative act, we think these provisions of the Revised Statutes make it absolutely mandatory in the plain and unmistakable language of the statute that the merchandise should be examined when appraised by a board of appraisers.

It will be observed upon reading together the three sections that the statutory duty, so far as an examination of the packages is concerned, is not satisfied by the ascertainment alone of a unit or gross value, but that it must be ascertained and found that the exact quantity of merchandise is involved. It seems trite to say that in order to properly appraise an importation of merchandise it is primarily necessary to ascertain the amount or quantity of that merchandise. An examination of the statutes discloses that in every of the cognate provisions the duty of that ascertainment is equally enjoined upon the appraisers with and as the basis of the ascertainment of the unit and aggregate value.

Section 2899 provides that no merchandise shall be delivered out of the customs custody until it shall have been "inspected or appraised," or "until the packages sent to be inspected shall be found correctly and fairly invoiced and put up, and so reported to the collector;" and, to render this ultimately possible, the same section enjoins upon the collector, either physically or by bonded control, possession of all the imported merchandise until it is not alone "examined and appraised" but also until it is found "correctly invoiced and put up."

We take it that this statute applies equally to all appraising officers, including general appraisers, for it is self-evident that where an appeal is taken from the appraiser and then to the general appraiser and then to a board of three general appraisers, until the board acts they are not "appraised." Each appeal suspends the appraisement from which it is an appeal, and then there is no appraisement until one of them becomes final for lack of appeal or the possibility of such.

And, so again, in section 2901, which, obviously by its terms, is extended to all the appraising officers, it is therein provided that the collector shall select "one package at least of every ten packages of merchandise, and a greater number should he or *either of the appraisers* deem it necessary, \* \* \* to be opened, examined, and appraised." Then the statute makes for the further injunction "if any package be found by the *appraisers* to contain any article not specified in the invoice" certain procedure shall be had.

The plain import of this provision of law is, in conjunction with section 2899, that the quantity of the merchandise as well as and as the basis for the aggregate value shall be ascertained by the appraising officers, and that by the opening and the *examining* of the packages.

It being true that in the pursuance of an appeal all appraisements below are set aside and the proceeding an appraisement *de novo*, we do not see how it could be said that the appraising officers who made, so far as future procedure is concerned, the only appraisement in the case, to wit, the Board of General Appraisers, have appraised according to the injunction of the statute, if they have not obeyed its injunction as to quantities and examined the merchandise.

But it has been contended that this section, in that it enjoins an examination of the merchandise, is directory and not mandatory. This contention is based upon two decisions of the Supreme Court of the United States, *Erhardt v. Schroeder* (155 U. S., 124, 130), and *United States v. Ranlett* (172 U. S., 132, 142). The *Ranlett* case, on the point stated, followed the *Schroeder* case. Both cases differ from this in that the real question at issue there was one of classification rather than appraisement. That fact is expressly mentioned in each case. In the *Schroeder* case the Supreme Court pointed out that in that case, the question being one of classification, the package, though

not examined by the appraising officers, could, under the statutes, be produced before the board, and that hence the importer was not deprived of the statutory right previously denied to have them examined. The Ranlett case was identically the same. The reason supporting those decisions does not exist here, and the Supreme Court distinctly took occasion to intimate in the Schroeder case that in an appraisalment proper the view of the court would be different, and therefore, as to that class of cases, that section 2901 must be held mandatory. The court said:

If the dutiable character of the goods in the present case were to be determined by value, the question of the effect of section 2939 might be of consequence to the importers, since in that event the value fixed by the appraisers, under section 2930, Revised Statutes, relating to appeals from appraisalments, would be final, unless the appraisalment were in some respect unlawful.

This is distinctly an appraisalment case, one of value, and there is no opportunity here, nor was there anywhere, after the decision of the board of three general appraisers, to have his goods examined, in the ascertainment of their value. In that class of cases it seems to us the plain intimation of the Supreme Court, and the logical sequence of these decisions, that in strictly appraisalment cases the provisions of section 2901 of the Revised Statutes are mandatory.

The Supreme Court in the case of *Greely's Administrator v. Burgess* (59 U. S., 18 How., 413, 416) had occasion to review the identical provision as a statute at large (5 Stat. L., 563-565, secs. 16, 17, 21). That was strictly an appraisalment case. The court said, speaking of the powers of appraisers:

All their powers are derived from these acts, and it is their duty to observe the restrictions and to obey the directions they contain. In the present instance, there was a neglect of the positive mandate "to open, examine, and appraise one package of every invoice, and 1 package, at least, of every 10 packages of goods, wares, and merchandise"; and the jury have found that the inquiry they made was not in substance nor in effect an equivalent for such an examination.

The precise language of section 2901 in this case, where it was not open to the importer by further procedure to have further examination, was before the court for consideration, and the court held that it rendered the appraisalment illegal. This differentiation reconciles all Supreme Court decisions on this point.

But even more pertinent is section 10 of the customs administrative act, formerly section 2902 of the Revised Statutes. This section provides:

SEC. 10. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets

of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

Here is a statutory injunction enacted as a part of the act creating the Board of General Appraisers. It can not be said from the broad scope of its language and the fact of its reenactment as a part of that act but that it applies to all appraising officers. Aside from the duty to "ascertain, estimate, and appraise the actual market value" of the merchandise, it especially enjoins that they shall ascertain, estimate, and appraise "*the number of yards, parcels, or quantities and actual market value or wholesale price of every of them.*"

Let it be particularly noted that this duty is enjoined, "any invoice or affidavit thereto or statement of cost or of cost of production to the contrary notwithstanding." It seems to us that the plain, unavoidable import of this section is to the effect that the appraisers must determine the market value, the quantity, and the number of parcels of the merchandise, regardless of the invoice or the evidence accompanying the same. They must do this "by *all* reasonable ways and means in \* \* \* their power." It seems to us that the only reasonable way, certainly one of "all" reasonable ways, to ascertain the quantities of merchandise and the number of yards and parcels is by the examination of the goods themselves or samples when authorized. Particularly is this true when they must do so without regard to the invoice, statement of cost, or the cost of production.

This provision, in substantially the form reenacted as section 10 of the customs administrative act and sections 2899 and 2901 of the Revised Statutes, has been the subject of discussion by the courts in numerous decisions upon the precise point at issue here.

The reasoning in *Ystalifera Iron Co. v. Redfield* (23 Fed. Rep., 650) seems particularly in point. The court rested the decision in that case upon section 2901, stating:

The decision by the reappraisers of the question what markets of the country from which the goods have been imported are the principal ones for the goods in controversy and their appraisal, made in accordance with the examination which is required by statute (act Aug. 30, 1842, 5 Stat. L., 563-565, secs. 16, 17, 21), required that one package in every ten packages of the merchandise to be appraised must be designated by the collector and must be examined, and there must be, in substance and effect, a faithful personal examination by the reappraisers of the number of packages which are required to be examined and appraised, or such an examination of the samples drawn from such packages as is equivalent to an examination of the packages themselves. If such an examination is not had, the reappraisal is invalid, and the excess of duty or the penalty that is imposed by reason of any increased valuations above those stated in the invoice is illegally imposed. *Greely's Administrator v. Burgess* (18 How., 413); *Burgess v. Converse* (2 Curt. C. C., 216); *Stairs v. Peaslee* (18 How., 521); *Belcher v. Linn* (24 How., 508).

The United States Circuit Court of Appeals for the Second Circuit in *United States v. Beer* (150 Fed. Rep., 560), having the same point

under consideration, affirmed the decision of the Board of General Appraisers that an appraisement without the samples before the local appraiser was invalid.

In *United States v. Loeb* (107 Fed. Rep., 692) the same court had previously considered the subject. It stated:

Repeated decisions of the circuit and supreme courts are to the effect that a neglect of the appraisers to take the means required by statute for an examination of the goods in question invalidates the appraisement. *Converse v. Burgess* (18 How., 413, 15 L. Ed., 455); *Oelbermann v. Merritt* (123 U. S., 356; 8 Sup. Ct., 151, 31 L. Ed., 164).

The court held in that case that the appraisement made by a board of three general appraisers appointed under the customs administrative act of 1890 was void for want of jurisdiction.

We have already commented upon the case of *Converse v. Burgess* (18 How., 413), decided by the Supreme Court of the United States. In *Oelbermann v. Merritt* (123 U. S., 356, 366) the same court approved the case of *Converse v. Burgess*, quoting from it with approval. The court continued:

If such nonobservance of the positive mandate of the statute in regard to the examination of so many of the original packages as the statute specified, as a condition on which the validity of the assessment depended, vitiated the appraisement, the non-observance of the statute in regard to the qualifications of the merchant appraiser must be regarded as equally one of the conditions on which the validity of the assessment depends. \* \* \*

The Supreme Court here points out that it is not alone necessary that the appraiser be qualified, but that the other provisions of the statute be followed.

We have already commented upon *Erhardt v. Schroeder* (155 U. S., 124, 130) and *United States v. Ranlett* (172 U. S., 132, 142). It might be well to note that in the *Ranlett* case the Supreme Court held in favor of the importer, specifying in the opinion of the court that he was entitled to relief, among other reasons, because "the statute was not strictly pursued in the examination."

The Board of General Appraisers reached its conclusion in the case at bar upon the theory of the statute and purposes of Congress expressed in this language:

If it is absolutely essential to the validity of such a proceeding that samples should be before the board, it must be because the statute enjoins the examination of the merchandise, or there is something inherent in the proceedings that makes the presence of such samples a necessity. The ancient theory was that the administrative department of government should decide all questions relative to the assessment and collection of taxes. Under the benign influence of republican institutions the tendency in modern times has been toward the breaking down and destruction of many of the old rules relative to the power of the sovereign which originated under monarchical governments, and the creation of tribunals wherein an impartial and judicial decision of every question that may arise between the citizens and the government might be had.

We are unable to perceive the application or the force of this reasoning in the particular case. A reappraisement case is made before a



board of general appraisers. That case is made up of the invoice, other papers, and such testimony as may be gathered in the course of appraisement proceedings under section 16 of the customs administrative act, and packages or samples of the merchandise identified by and referred to in the invoice and possibly the testimony. The only question here is, Shall the Board of General Appraisers examine a part of this "case" and not examine the goods themselves, the corpus of the case, or shall they examine the whole of the case looking at the goods as well as the invoice and the testimony? We do not think that it was the purpose of the customs administrative act of 1890 to relax the rule of a century and to permit of appraisements, or the decision of a controversy between citizens and the Government, by permitting the deciding tribunal to ignore a very important part of the "case." This would seem retrogression rather than advance.

The wisdom of this requirement is demonstrated by this record, for an examination of some of the packages, the goods being embroideries, by the general appraiser showed the invoices incorrect in many particulars, and the amount of duties due admittedly different from the entered and invoice values, which could only be shown by an examination of the goods.

And, as stated by the Supreme Court in *Greely v. Thompson et al.*, *supra*:

\* \* \* An article may be barely merchantable, and yet not be worth so much as one that is not only merchantable, but on the brink of being better than merchantable. A personal examination, therefore, is proper for making such discriminations in quality and value.

The determination of job lots, primary and secondary qualities of goods, and in such cases as these the proper invoicing according to stitch rate of embroideries, demonstrates the wisdom of this requirement.

We think that the history of legislation in customs matters indicates the purpose of Congress to make for prompt as well as fair adjustment of issues between the taxpayer and the Government. We conceive of no right of the individual which suffers here; but even so, while the rights of the individual are ever to be regarded, the right of the Government to collect the necessary revenues for its conduct and maintenance is paramount. The rights of the individual must always yield to the rights of the many.

The Supreme Court of the United States has aptly expressed itself upon the precise question of having reappraisement proceedings determined by judicial procedure. In *Cheatham et al. v. United States* (92 U. S., 85), that court said:

All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them.

These measures are not judicial; nor does the Government resort, except in extraordinary cases, to the courts for that purpose.

In *Auffmordt v. Hedden* (137 U. S., 310, 323) the Supreme Court said:

We are of the opinion, under the statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the statute, and the practice has been to the contrary from the earliest history of the Government. No government could collect its revenues or perform its necessary functions if the system contended for by the plaintiffs were to prevail.

See, also, *Origet v. Hedden* (155 U. S., 238).

While appraisements constitute but a minor portion of the duties of the general appraisers, whose duties and procedure in the main and on the classification side are strictly judicial, nevertheless their character being defined by statute, their performance by judicial officers can not change that character. In many instances duties ministerial and otherwise are cast upon judicial officers. It does not necessarily follow that the function performed takes character from the officer who performs it. It takes its character from its first performance by the local appraiser, and we do not find that character changed in its last solution.

Section 12 of the customs administrative act in prescribing the duties of general appraisers states that they shall have supervision over appraisements and classifications. Their jurisdiction of appraisements is essentially *de novo*. It has been held that there is no requirement to advise the board which party is the appellant in such cases; that their duties are to ascertain market value, etc., of the goods, and it does not concern them whether the collector or the importer is the appellant. This is not a condition which appertains to a judicial function.

The character of the duty seems to be more aptly expressed by its definition. They are to "appraise" merchandise, and in this capacity are "appraisers." An appraiser, as defined by Burrill's Law Dictionary, is—

A person appointed by competent authority to ascertain and state the true value of property *submitted to his inspection*. and who is usually sworn to perform such duty.

The Supreme Court of the State of Iowa has held in *Vincent v. German Insurance Co.* (120 Iowa, 272) in effect that—

To appraise is to estimate value, and such is the duty of arbitrators appointed to ascertain and appraise "the sound value of, and the loss upon, the property damaged," and it requires the arbitrators to make an appraisement and not to hear evidence. (See Words and Phrases, Art. "Appraisers.")

It was probably for that reason that while constituting the Board of General Appraisers and otherwise specifically defining their duties that Congress, by section 16, expressly empowered them in the performance of those duties to take evidence.

We think not alone the plain implication but the express words of the law require in all reappraisement cases, before whatever tribunal, that the very subject of the proceeding, the goods or their statutory equivalent, that which bears the best evidence not only of the value but other statutory essentials, that which is referred to on the invoice and usually the testimony, thereby being constituted an integral part of the case presented for appraisement, must be examined and can not be ignored in any valid appraisement.

Reappraisement proceedings are purely statutory. They are rights in the nature of gratuities, and are measured by the language of the statute. The prescribed mode is the measure of the power. These propositions are fundamental. *Nichols v. United States* (7 Wall., 126), *Dooley v. United States* (182 U. S., 222), *Schillinger v. United States* (155 U. S., 166).

While the acts provided that the goods should be examined, a statutory equivalent is prescribed by section 2901. One package of every invoice, and at least one package in every ten, is the prescribed statutory equivalent, unless the collector or *any of the appraisers* deem this insufficient, in which case they may call for any or all of them. No such call having been made in this case by either of the parties mentioned, and, indeed, the importer himself having made no objection to the sufficiency of the samples before the board, the statute was complied with.

While the importer offered evidence to prove that many of the items upon the invoice in question were not represented in the public-stores cases, no proof was offered that an insufficient number of cases, as required by section 2901 of the Revised Statutes, was before the reappraisement board. It appears that a certain number of cases of each invoice were sent, but how many cases were included in that invoice nowhere appears. It has not been shown, therefore, that there was a failure to comply in any respect with section 2901 in forwarding the legally required number of cases to the board, nor does it anywhere appear that those cases and the contents were not examined by the board. The importer offered no testimony to show that the public-stores cases were not examined. On the contrary, Mr. Lunt testified positively that the board examined all of the samples that were presented by either the importer or the Government. In this particular the board states:

In the case at bar that question is not presented, as 1 package in every 10 and 1 package from every invoice was sent to the public stores, and the merchandise therefrom, or sufficient samples of it, was before the local appraiser, the general appraiser, and the board of three general appraisers.

We think that it is fairly established and that there is no evidence to the contrary in this record that the legal number of cases were

sent to the public stores for examination and were examined by the reappraisement board.

In the absence of proof to the contrary the presumption is that the board performed its duty and did examine these packages. While, therefore, we do not agree with the reasons assigned by the board its decision must be *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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UNITED STATES *v.* CENTRAL WESTRUMITE Co. (No. 96).<sup>1</sup>

WESTRUMITE ASPHALT—ASFALTUM OR BITUMEN ADVANCED IN CONDITION.

In the composition of the merchandise, it appears from the record that the original substances employed in the making are different kinds of asphalt or bitumen and that certain chemicals and water are added solely for the purpose of combining the different kinds of asphalt and bitumen and so to perfect the material resulting for use as paving material: *Held*, the material is not to be classified as a chemical compound or mixture, but rather as asphaltum or bitumen advanced in condition, and as such dutiable under paragraph 90, tariff act of 1909.

United States Court of Customs Appeals, April 3, 1911.

TRANSFERRED from United States Circuit Court, Eastern District of Michigan,  
Abstract 22924 (T. D. 30447).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*Brown & Gerry* for the appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise is so-called "westrumite asphalt," manufactured in Canada, and imported at the port of Port Huron, Mich.

The return of the collector states that the duty of 30 per cent ad valorem levied by him was under the provisions of paragraph 56 of the tariff act of 1909 "on certain westrumite (liquid asphalt) \* \* \* returned by the appraiser as liquid asphalt and ammonia (as paint) \* \* \*."

The protestant claimed that the goods were dutiable under paragraph 90 of that act as "asphaltum \* \* \* dried or otherwise advanced in any manner \* \* \*."

At the hearing before the Board of General Appraisers both sides conceded that the article was improperly assessed by the collector. The Government contended there, as it does here, that the proper provision levying duty on the imported article was paragraph 3 of that act, wherein it provided for "all chemical compounds, mixtures, and salts, \* \* \* not specially provided for in this section," as a "chemical mixture." The importer contended, and here maintains,

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<sup>1</sup> Reported in T. D. 3143 (2) Treas. Dec., 665).

that it was properly dutiable under paragraph 90 of that act, which provides for "asphaltum and bitumen, not specially provided for in this section, \* \* \* if dried or otherwise advanced in any manner \* \* \*."

The Board of General Appraisers, upon the very meager record that was tendered, held that the merchandise was dutiable as claimed by the importer per force of the provision of paragraph 481 of that act, asphaltum being the material of chief value, which provision reads:

\* \* \* and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value. \* \* \*

The Government further contends that the importer should fail here, as the last quoted provision was not invoked by his protest. The board held this unnecessary.

Upon the record presented it is impossible to determine with any degree of satisfaction whether the imported merchandise is an emulsion, a chemical mixture, or a chemical compound. There is some evidence upon each point. Upon the material point, whether saponification takes place in the processes of its manufacture, the testimony of the one witness who was heard is uncertain, if not conflicting.

There is in the record an analysis by the chemist at the port of New York of the imported articles, but the chemist himself was not called to in anywise enlighten the board or this court as to the chemical effects or reactions resulting from the processes and combinations of material effecting the production of the article, so that we are unable to determine whether this is a solution or emulsion, or a mixture without combinations, or if there has been a chemical reaction of the ingredients.

The board found that the merchandise is not a chemical mixture.

The only witness who testified was Mr. L. S. Van Westrum, from whom the article takes its name.

Samples of the merchandise were introduced and are before the court. As imported the article is of a liquid form. An illustrative sample was introduced as it appears in final use. It is used as a binder for holding together rocks, gravel, and similar substances in the making of bitumen pavements. That is its sole use. After being exposed to the atmosphere for 8 or 10 days the liquid becomes, as tense and hard as rock.

Mr. Van Westrum testified that it consisted of a mixture of 20 per cent California asphalt, 20 per cent Trinidad asphalt, 12 per cent paving flux—which is a liquid asphalt—6 per cent of chemicals, and from 48 to 62 per cent of water. In producing the articles the Trinidad asphalt is first placed in a large vessel and heated to a liquid state, and to this is then added the paving flux, and then the California asphalt is added. This mixture is then allowed to cool

down, and then certain chemicals are added, the names of which Mr. Van Westrum declined to state, as they were a trade secret. The effect, he testified, was that the whole emulsified; that there was no chemical reaction, because emulsification is not a chemical reaction, but simply the holding of the atoms of asphalt in solution; that if this emulsion were boiled it would simply precipitate the asphalt; that this amounted to a mechanical and not a chemical change. He stated later that ammonia was added, but did not make the statement that that was the only chemical. After all this, water is put in, and the amount of water differs according to the season of the year. He further stated that in ultimate use the chemicals evaporated, and when they evaporated the asphaltum was precipitated and became hardened in the form shown by the illustrative exhibit mentioned, which is a small section of asphalt or bitumen pavement or street covering.

No further testimony was introduced by either party.

It is apparent that the determination of whether or not these processes applied to the material stated would result in an emulsion holding the ingredients in solution or a chemical mixture or a combination with any degree of certainty is impossible from this record.

No commercial usage was invoked because the article, being a new and patented one and not sold in wholesale or retail in this country, no commercial name had attached. It is designated by the importer as "asphalt," and its sole use is one of the common uses of asphalt or bitumen.

Asphaltum, as defined by the Century Dictionary, is:

*Asphaltum*.—One of the so-called bituminous substances which are widely diffused over the earth and are of great practical importance.

The asphaltums of various localities differ from each other considerably in chemical composition, as is proved by their different chemical reactions.

As the dutiable provision of paragraph 90 affects both "asphaltum and bitumen," any attempt at differentiation would be unprofitable.

We think that the only uncontradicted and certain fact made clear by the record is that the original substances employed are different kinds of asphalt or bitumen; that the chemicals and water are added solely for the purpose of combining the different classes of asphalt and bitumen and bringing them into that united form and condition that they may be as such readily applied and used as a binder of rocks, gravel, and other materials in the construction of asphalt or bitumen pavements; that when this use is effected and the article or mass of asphaltum and bitumen is exposed to the atmosphere, without other than natural or mechanical means, the asphaltum and bitumen content is precipitated, and, by evaporation or other elimination, assumes a molecular character and condition as asphaltum, or at most, bitumen, and is nothing more or less than a variety of the great family of bitumens.

Undoubtedly the application of the chemicals and the processes bringing it to this condition of adaptability, and which are a part of the merchandise as imported, improve the condition and value of the original varieties of asphaltum that are by this means assembled and made into a kind or combination of asphaltum or bitumen. This condition, however, can not be more aptly described than bitumen or asphalt advanced in condition, and we think that in that condition, as imported, it is "asphaltum and bitumen advanced in condition." Whatever the processes which are being devoted to these varieties of asphaltum and bitumen while and when imported they are but processes assembling and advancing in condition several kinds of asphaltum and bitumen from separate quantities into a single product of such for use as such.

In that view it becomes unimportant to inquire whether or not it is, or is not, a chemical mixture, or a chemical compound, or a chemical salt. It may be, and probably is, both "asphalt and bitumen advanced in condition" and at the same time a "mechanical mixture" or compound. In this status, for customs purposes, it is properly dutiable as asphalt or bitumen advanced in condition for the reason that that phrase is more specific than either the phrases chemical mixture, chemical compound, or chemical salt.

The case is quite similar in this particular to that of *Fink v. United States* (170 U. S., 584). In that case the subject under consideration was muriate of cocaine, which was stipulated a medicinal preparation, and the question was whether the term "medicinal preparation" was more specific than "chemical compound" as such was used in the tariff act of 1890. The Supreme Court held that the chief use of muriate of cocaine being shown to be that of a medicinal preparation the merchandise was more specifically provided for as a medicinal preparation than as a chemical compound.

In this case the uncontradicted record is that the sole use of the imported merchandise is as an asphaltum and bitumen, and being such, as we have seen, advanced in condition, is more specifically provided for as "asphaltum and bitumen advanced in condition" than as a "chemical mixture." The phrase asphaltum and bitumen advanced in condition is even more specific than that of medicinal preparation, whilst the contesting words chemical mixture and chemical compound are essentially the same.

We think, so far as shown by this record, the merchandise falls directly within the terms of paragraph 90 of the act, and in that view consideration of the other points discussed in the briefs is unnecessary.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

ACKER *v.* UNITED STATES (No. 103).

## 1. COUNTRY OF ACTUAL EXPORTATION.

Champagne produced in France, exported from that country to Great Britain without a then existing intent on the part of either party to the transaction to export from France to the United States, followed by storage of the goods, assumed to be in a bonded warehouse in London, and by the owner there subsequently sold to importers in the United States to fill an order, the compliance with which did not specify or require champagne produced in France, and without any intent on the part of the importer in this country to import from France here, is not an importation from France to the United States under the provisions of the reciprocity agreement concluded between that country and this January 28, 1908.

2. *EX PARTE* AFFIDAVITS.

It seems that an *ex parte* affidavit taken abroad for the purpose of introducing the same before the Board of General Appraisers may not be competent evidence before this court.

United States Court of Customs Appeals, April 3, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 20749 (T. D. 29597).

[Affirmed.]

*B. A. Levett* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The appellant on or about September 11, 1907, imported at New York certain champagne in bottles which was duly entered for warehousing. After February 1, 1908, it was withdrawn for consumption. On January 28, 1908, a reciprocity agreement between the United States and France was concluded and by the President promulgated, by his proclamation of that date, setting forth the same. (T. D. 28721.) Under paragraph 295 of the tariff act of 1897 the duty imposed on said champagne imported in bottles, containing more than a pint and not more than a quart, was \$8 per dozen, and when in bottles containing not more than 1 pint and more than one-half pint, \$4 per dozen. This importation being contained in bottles of the above sizes, the collector assessed duty thereon accordingly and his action was sustained by the Board of General Appraisers.

The importer contends that the duty should have been assessed at the rate of \$6 instead of \$8 per dozen on the quart bottles of champagne and \$3 per dozen instead of \$4 for the above-mentioned smaller size by virtue of the above-named reciprocity agreement and the act authorizing it. The material portions of section 3 of the tariff act of

<sup>1</sup> Reported in T. D. 31481 (20 Treas. Dec., 669).



1897, by virtue of which the reciprocity agreement was concluded, are as follows:

That for the purpose of equalizing the trade of the United States with foreign countries, and their colonies, producing and exporting to this country the following articles: \* \* \* the President be, and he is hereby, authorized, as soon as may be after the passage of this act, and from time to time thereafter, to enter into negotiations with the governments of those countries exporting to the United States the above-mentioned articles, or any of them, with the view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; and whenever the government of any country or colony, producing and exporting to the United States the above-mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this act on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows. \* \* \*

There is no real question but that the champagne was produced in France. The board found that it was shipped from London to the appellant, having been purchased by them of G. F. Grant & Co., of that city. They also found that the champagne was shipped from France to London and placed in a bonded warehouse by the vendor of the appellant. It does not appear when the shipment from France to London was made.

It is conceded that the only question in the case is whether the champagne was exported from France to this country, and that if so, the merchandise was dutiable as claimed by the appellant.

It is familiar law that the burden is upon the appellant to maintain its claim. It appears from the appellant's evidence that it purchased the goods from G. F. Grant & Co. in London and that at the time the order was given there was no understanding between appellant and its vendor that the champagne ordered should be procured from France or that the order should be filled with champagne that had been produced in France. In other words, champagne was ordered of said Grant & Co. in London and they were to fill the order without regard to the country of its production. The appellant does not appear to have had any intention or desire to import from France, and it does not appear when the knowledge that it had made or might make the claim to have made such an importation was first brought home to it. It does not appear from whom the champagne was first purchased in France, neither does it appear that at the time the champagne was sent from France to England it was intended or designed by the then vendor or vendee that it should be exported from France to the United States or from England to the United States.

It is claimed by appellant that the fact that the champagne was kept in a bonded warehouse in London prevented it from entering into the commerce of Great Britain, and it is said that the sending of the merchandise from France to London and then from London to New York is merely a transshipment at London, and that such transshipment was but one step in the entire act of exportation from France to this country.

The act under which the reciprocity agreement was negotiated provides that such agreement may be made with countries producing and exporting to this country articles which are the authorized subjects of the agreement and that the agreement when negotiated shall reduce the rates of duty on the articles so exported to the United States as in the act provided. If it can be said that the shipment to London from France, under the circumstances, was but one step in the entire act of exportation from France to the United States it could with equal force be urged that the purchaser of the champagne in London could have sold it to another purchaser, a resident of some other country, and so in like manner it might have been sold and shipped from port to port, from one country to another, so long as vendors and vendees pleased, and if finally it was imported into the United States it could be said that the various exportations and importations and changes of ownership were each a successive step in the entire act of exportation from France to the United States.

We do not think such a conclusion would be sound.

The intent with which an act is done is many times conclusive of the effect of the act. There is nothing in the record which shows that the intent of Grant & Co. in purchasing the champagne in France and shipping it to London was different than what would ordinarily therefrom be presumed, namely, that it was their intent to import the champagne to England. The fact that it was placed in a bonded warehouse does not change the natural presumption which otherwise obtains because the placing the same in such warehouse is not inconsistent with an importation to England; the importers had the right to place the same in their own warehouse or in a bonded warehouse at their own election and any subsequently acquired intent on the part of Grant & Co., if any there were, and none is shown by the record, of treating the original exportation from France to London as one step in an importation to the United States could not change the effect of the first importation to England.

It may be observed that the fact that the champagne remained in bond in London until shipped to this country is based upon an *ex parte* affidavit which was received in evidence by the board over the objection of counsel for the United States, whose objection was

that the affidavit was *ex parte* and that no opportunity for cross-examination had been afforded. This objection has not been waived. Our attention has not been called to any statute, decision, or rule of procedure which renders such an affidavit admissible over such an objection, and if the facts stated in the affidavit were the basis of any finding by which the appellant's contention could be sustained we should, unless statute or authority to the contrary exists, undoubtedly feel constrained to say that there was not competent evidence to support such finding.

The statement in the affidavit that "none of said champagne entered into the commerce of Great Britain" we construe to mean that in fact the same had not been bought and sold there. Obviously the affiant's conclusion that as matter of law it had not reached that condition, if he intended to so state, is without probative force.

Assuming, however, that it is proven by legitimate evidence that the champagne was kept in bond in London, we do not think the conclusion to be reached can be thereby affected.

In *Gibson v. Stevens* (49 U. S. [8 How.], 383) it was held that the title to merchandise the subject of commerce was transferable by the indorsement and delivery of the bill of lading when the merchandise was in the custody of the warehouseman, and it was said that such was the law of England and of this country, and that it was "absolutely necessary for the purposes of commerce."

It can make no difference whether the goods are in bonded warehouse or in a warehouse not bonded.

Applying the doctrine of that case to the facts here, assuming the affidavit to be competent evidence of facts therein set forth, it appears that this merchandise, although in a bonded warehouse, entered in one sense at least into the commerce of Great Britain. Especially must this be true when there is no evidence that at the time this champagne was placed in the bonded warehouse there was any intent on the part of Grant & Co. to export the same to the United States. So, in that view, it is immaterial whether the merchandise was in a bonded warehouse in London or was elsewhere in England in the possession of Grant & Co. It was in either event subject to bargain and sale there.

It is claimed by appellant that there is nothing in the reciprocity agreement or the act authorizing it that in terms provides for a direct shipment from France to the United States or that precludes a transshipment in the course of the transmission from France here.

With this we agree, and we do not mean to decide that in proper cases transshipment may not be had in the course of exportation from France to the United States. We do, however, hold that when the merchandise leaves France there must exist an intent to export

it from that country to this; that it must be then destined for the United States and intended to enter into and become a part of the merchandise of this country; and it follows that any transshipment in the course of its passage from France here that is consistent with such preexisting intent would be permissible.

As before pointed out, this case is barren of such conditions. The merchandise was first exported from France to England, and while it was in the latter country the intent first arose to export it to the United States, which intent was carried to execution. The champagne was, therefore, imported to this country from Great Britain and not from France, and the judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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BRIGGS, EXTRX., v. UNITED STATES (No. 311).<sup>1</sup>

REAPPRAISEMENT BY BOARD OF GENERAL APPRAISERS.

On an admittedly imperfect record it appears a Board of General Appraisers reappraised a consignment of goods; yet even if it be assumed the board erred in excluding relevant evidence or in admitting irrelevant evidence, or that it assigned an undue weight to the evidence before it, still, there being evidence that the board acted upon evidence, and there being no evidence here that the board exceeded its authority, it will be presumed to have made its finding within the scope of its authority, and its decision must stand.—*Wolf v. United States* (T. D. 31217) cited and approved.

United States Court of Customs Appeals, April 3, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23555 (T. D. 30710).

[Affirmed.]

*B. A. Levett* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, and BARBER, Judges.

HUNT, Judge, delivered the opinion of the court:

Appellant herein imported certain chinaware into the United States on March 5, 1907. The merchandise was advanced in value by the appraiser, and was the subject of a reappraisal by a general appraiser, who sustained the entered value. A further reappraisal was had by a board of three general appraisers, under the provisions of section 13 of the act of June 10, 1890, which resulted in the board's advancing the goods 5 per cent above the entered value. The importer protested, and appealed from this decision to the Board

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<sup>1</sup> Reported in T. D. 31482 (20 Treas. Dec., 673).

of United States General Appraisers, which, after refusing to admit the record of proceedings before the reappraisement board, overruled the protests.

The importer now asks that the decision of the Board of United States General Appraisers be reversed, or that the case be remanded to the board with instructions to admit the record in evidence and decide the case on its merits.

The record shows that it was admitted by counsel before the Board of General Appraisers that it was incumbent upon the importer to show that there was no evidence before the board of reappraisement to support the finding of said board. Accepting this burden, counsel for the importer asked leave to submit in evidence the reappraisement record, "not for the purpose of weighing it, but merely to see if there was any evidence upon which the board could make the findings." With this offer, counsel said he would rest the importer's case.

Counsel for the Government objected to the introduction of the record of proceedings before the board of reappraisement for the reason that the record offered related to "reappraisements 44147, etc.," not covered by any of the protests concerning the goods directly involved, and upon the ground that material papers and exhibits were lacking. Counsel said that among the exhibits described as not found was one marked "No. 2," a price list; one marked "No. 4," a bill of purchase; some samples of chinaware; a price list of an importer, Haviland; a report of a special agent referring to other papers; also a catalogue of the importer, Briggs. Counsel for the importer said that the exhibits being public records and part of the files of the Board of General Appraisers, he could not be held responsible if they were not there. Thereupon, counsel for the importer, disregarding his previous statement that he would rest his case, offered to call General Appraiser Fischer to show that the particular record offered in the case was that upon which the immediate cases were decided by the board of reappraisement. The Board of General Appraisers excluded the record, expressing the opinion that, in the condition in which it was, it was inadmissible. Counsel for the importer then at once asked leave to supply the deficiencies in the record, stating that the records were in the custody of the Board of General Appraisers, and urged that "the record should be admitted for what it is worth, even if it is not complete; the testimony is complete."

After some discussion as to the whereabouts of the missing exhibits counsel for the importer asked for a continuance of the case to enable him to produce the missing exhibits or evidence as to what they were. An adjournment of three weeks was then ordered.

When the hearing was resumed, counsel for the importer again based the protest against the liquidation of the collector upon the ground that there was no evidence upon which the board of reappraisement had formed its opinion and upon the ground that, as no goods of Theodore Haviland's were sold on the other side in whole-sale quantities, the construction of section 19 required that the export price should be taken. Counsel said that if the board of reappraisement had proceeded upon a wrong construction of the law the Board of General Appraisers could review the ruling, and that if it should find that the Government had showed retail sales then the reappraisement board had acted contrary to law in holding that retail sales were sufficient to shift the burden of proof. Counsel said that he proposed to show by the record and by evidence that no sales at all were made on the other side. Counsel for the Government objected upon the ground that there was nothing to show that the hearing before the board of reappraisement was open. No direct ruling seems to have been made; but the Board of General Appraisers allowed the counsel for the importer to proceed with his evidence and to call the clerk of the reappraisement division to testify. This witness said, in effect, that the papers filed with reappraisements No. 44147, etc., handed to him for examination, were, so far as he knew, those which contained the papers and testimony which were before the reappraisement board that tried the matter under consideration.

Mr. Levett, counsel for the importer, also testified and identified the record of testimony which was heard in open hearing before the board of reappraisers, saying that such record marked "reappraisements 44147, etc.," pertained to protests then before the board, and that, so far as he knew, the record showed everything that was admitted in evidence before the board of reappraisers.

The clerk of the Board of General Appraisers also testified in behalf of the importers, and said, in effect, that while he could not identify the particular envelope or papers, he presumed that they were those which had been filed before the board of reappraisement, and that in the ordinary course of business the papers would be filed with the case number appearing upon the envelope.

Counsel for the importer again offered the papers referred to. Counsel for the Government objected, on the ground that the number appearing on the reappraisement record was not covered by any protest then under consideration before the Board of General Appraisers, and that the abbreviation "etc.," which appeared on the envelope after the number 44147, had not been explained; that there were 19 reappraisement cases covered by the protests under consideration, and that the date that appears on them was different from that appearing on the record offered in evidence; that the

record did not purport to be an open hearing; that the record was incompetent and immaterial, and also that certain exhibits, a bill of sale, and a price list of Haviland's were missing.

Counsel for the importer then stated to the Board of General Appraisers that the date, May 22, was not the date that the cases were decided, but that they were all in one record; that the record showed that there had been examination and cross-examination of witnesses; that the evidence did not show that any exhibits were missing, and that although the record disclosed that certain exhibits were offered before the board of reappraisement, there was nothing to show that the exhibits had been considered by the said board. The importers' counsel admitted, however, that some exhibits were missing, but said that the missing exhibits were offered in evidence by the Government and not by the importer, but that as the testimony accurately described the exhibits, the Board of General Appraisers could tell exactly what they were; that the record showed that among the exhibits were three or four plates and a catalogue, but that the figures as given in the catalogue were given in the testimony, and that the plates were described; that the record showed that the reappraisement board did not consider the catalogue; that the testimony showed that there were no sales brought in wholesale quantities, and that the board had no evidence to support its finding and had acted contrary to section 19, which counsel said applies to the export price when there are no sales on the other side.

The board rejected the record, and again the counsel for the importer proceeded with evidence, calling an examiner of merchandise, who testified that he recalled the Briggs china importation, and that he had had in his possession a price list of Haviland, and that he examined the price list; that he had a catalogue, and that the prices to which he had advanced the goods were in some instances the catalogue prices with "20 and 2 off," but that there were other goods not advanced to the catalogue prices with discount off.

A witness named Burgess, called for the importer, said that he had testified before the reappraisement board; that he recalled the price list that had been introduced in the reappraisements 44147, etc.; that there was an illustrated catalogue and a price list and two separate books; that one was a wholesale illustrated list and the other a wholesale selling price list; that the indication that it was a wholesale list from the Paris house was that it indicated the prices and assortments of the various countries, not only for France and for Holland, but Germany and for other countries. Witness said that certain parts of the evidence relating to exhibits referred to particular illustrations appearing in the catalogue, and that the catalogue correctly represented certain plates.

Counsel for the importer again offered the record in evidence, on the ground that he had identified every exhibit except the price list, and that there was no other evidence relating to the price list in the record; that the record, supplemented by the testimony just theretofore taken, showed what was before the board of appraisement, and therefore put the Board of General Appraisers in a position to pass on what was before the reappraisement board. His argument was then that there was enough before the Board of General Appraisers to show that the reappraisement board was not justified in its finding.

A summary of the attitude into which the case finally drifted is gathered by the following question and answer:

General Appraiser HAY. You offer this record to show: First, that the board had no testimony before it to base its finding; second, for the purpose of showing that the price was a retail price and not a wholesale price?

Mr. LEVETT. Third, that the board in advancing the goods on that record proceeded contrary to section 10, which provides that they must pursue reasonable ways and means. I think the board was unreasonable in accepting the testimony of Mr. Burgess and the catalogues and the different articles offered in evidence. I think they were unreasonable in all of that.

General Appraiser SOMERVILLE. The board is of opinion that the purpose for which that testimony is offered is not warranted and the effect of it would be an attempt on the part of the importer's counsel to convert this board of classification into a board of reappraisement, and for that reason we propose to exclude it, and furthermore, that the record is not complete.

General Appraiser HAY. The record shows upon its face that it is an incomplete record.

Mr. LEVETT. May I ask if the board's sole reason for ruling it out is that it is incomplete?

General Appraiser SOMERVILLE. Not at all.

Counsel for the importer was then allowed to call Mr. Fischer, chairman of the reappraisement board. Mr. Fischer stated that at the hearing in the Briggs china matter, before the reappraisement board, two books were in evidence, catalogues issued by the Paris or French house of Haviland, and that he remembered there was a price list, and that some plates were introduced. Counsel for the importer then asked Mr. Fischer whether, in rendering the decision of the board of reappraisement, the missing exhibits were considered, but objection to this question was sustained by the Board of Appraisers. Thereafter, counsel for the importer sought to have the case reopened, basing his application upon the ground that it was competent to show that the board of reappraisement proceeded upon a wrong principle; that he desired to introduce oral testimony as to whether the reappraisement board took Paris or Limoges as the market. The board declined to reopen the case.

The Board of General Appraisers decided that the contention of the importer that the board of reappraisement had made its finding



without evidence to support it, was not supported by the evidence, and overruled the protests.

Careful examination of the foregoing statement makes it very plain that the position of the importer, wherein she rested her case upon the ground that the reappraisement record offered would show that there was no evidence upon which the reappraisement board could have made its finding, must be regarded as having been abandoned, because after the exclusion of the offer of the records, her counsel voluntarily proceeded to introduce testimony which was inconsistent with his offer, in that it showed conclusively not only that, as a fact, there was material oral evidence heard by the reappraisement board when it made the finding objected to, but that such evidence was supplemented by exhibits consisting of price lists, wholesale catalogues from Paris, and sample china plates. Thus the case as submitted became one where the board of reappraisement advanced the value of merchandise, after hearing evidence apparently relevant, bearing upon the value of the merchandize at the place of export, as defined by section 19 of the tariff act of June 10, 1890.

Under such conditions the importer herself is bound by her evidence, introduced before the board, establishing facts which, aside from the record offered, rendered the acts of the reappraisement board valid and conclusive, as against the attack made upon it; wherefore it follows that the several assignments of error based upon the action of the Board of General Appraisers in excluding the record of proceedings before the reappraisement board pertain to a matter of no material importance.

There is no evidence which tends to show that the board of reappraisement acted in excess of its jurisdiction, and though we might assume that it erred in excluding evidence which was competent, or admitted evidence which was incompetent, or that it improperly weighed evidence which was before it, still having acted within its authority, its decision can not now be impeached.

In *Wolff v. United States*, *supra*, p. 181 (T. D. 31217), we gave much attention to the question of attacks upon the findings of appraisers and boards of reappraisement, and inquired into the strength of the judgments of such officials and boards, and announced the rule which controls in the present case. Judge Smith, for the court, said:

From mistakes and errors made by the appraiser and general appraiser in the exercise of their power and jurisdiction to appraise, the statute provides the remedy of appeal to a Board of General Appraisers, and when that body has passed upon the appeal the door is closed by the express terms of the statute upon further inquiry into the matter. *Origet v. Hedden* (155 U. S., 228). To permit of a review of a decision of the appraisers on the ground that it was erroneous, that it was mistaken, that it was incorrect, that it was induced by a wrong conception of the facts, that the appraisers had not used good judgment, that they ignored facts which they should have considered or gave weight to evidence which should have been excluded, would overturn the

whole system so carefully and wisely elaborated by Congress for the determination of values and the prompt collection of customs duties. Inquiry into value and the methods of reaching it must end somewhere, and when Congress decided that it should end with an appeal to the Board of General Appraisers sitting as a reappraisement board, its wishes in that behalf should be respected, especially as a judicial revision could afford no higher guaranties of a flawless judgment, no better security for a decision free from error, than does that of the system which the legislature saw fit to establish. Evidence that appraising officers were careless, or even irregular, in the performance of their duties falls short of showing that they assumed powers not conferred on them by the statute, and their valuation can not be impeached by evidence of that character. Neither is it competent to inquire as to whether the appraisers followed or disregarded the evidence produced before them. *Hilton v. Merritt* (110 U. S., 97, 107); *Auffmordt v. Hedden* (137 U. S., 310, 325). Estimates of value require the consideration of many elements.

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The fact that a method of appraisement is employed which would lead to erroneous results and which could not be relied upon as a safe guide in any case does not nullify the appraisement. *Bartlett v. Kane* (16 How., 263, 271).

Appraisements have been reviewed where the appraisers were disqualified from acting, and therefore had no power, authority, or jurisdiction to make them. *Greely v. Thompson* (10 How., 225); *Oelbermann v. Merritt* (123 U. S., 356); *Mustin v. Cadwalader* (123 U. S., 369). They have been set aside by the courts when the appraisers have not examined or seen the goods which the law required them to examine or appraise, and had therefore failed to acquire in the manner prescribed by statute jurisdiction of the subject matter upon which they were to exercise their discretion and judgment. *Greely's Administrator v. Burgess* (18 How., 413); *Oelbermann v. Merritt* (123 U. S., 356). They have been declared invalid by judicial tribunals where the appraisers, after finding market value and wholesale price, have, independent of such value, added on items which it was not their function, but that of the collector, to determine, and from the finding of which by the collector an appeal to the courts is expressly allowed by the provisions of sections 14 and 15 of the act of June 10, 1890. *United States v. Passavant* (169 U. S., 16, 19); *United States v. Klingenberg* (153 U. S., 93, 101, 104); *Badger v. Cusimano* (130 U. S., 39, 43); *Hilton v. Merritt* (110 U. S., 97, 106); *Robertson v. Frank* (132 U. S., 17, 24); *Oberteuffer v. Robertson* (116 U. S., 499, 515).

But these decisions have carefully refrained from impeaching the appraisement in so far as it related to the simple finding of market value, and even where "charges" have been considered by appraisers as an element and factor in reaching a conclusion as to such value the courts have declined to interfere. *Belcher v. Linn* (24 How., 508); *Passavant v. United States* (169 U. S., 16, 25).

No force of argument can withdraw the present case from the consequences of the principles just enunciated. They flow from the facts affirmatively showing jurisdiction in the reappraisement board, and valuations found by it in the lawful exercise of jurisdiction.

It follows, therefore, that the Board of General Appraisers was right in refusing to sustain the importer's protests, and their decision is affirmed.

MONTGOMERY, Presiding Judge, and SMITH and BARBER, Judges, concur. DE VRIES, Judge, being disqualified, took no part in the voting or decision of this case.

TALBOT v. UNITED STATES (No. 490). PERRY v. UNITED STATES (No. 491). KRAUT v. UNITED STATES (No. 492).<sup>1</sup>

## 1. REFUSAL OF ENTRY.

The tariff act of 1909 was signed at 5.05 p. m. on August 5, and went into effect the next day. Business hours at customhouses, by virtue of reasonable departmental regulations then in force, ended at 4.30 p. m. At that hour certain importations had not arrived within a collector's jurisdiction: *Held*, under these circumstances a tender of payment of duty under the provisions of the act of 1897, made a few minutes after 4 o'clock, was properly refused for the reason that the importation was not within the jurisdiction and the collector was not bound to keep his office open beyond the regular hour for closing for the purpose of permitting an entry to be made later that day.

## 2. OFFICE HOURS.

Nothing further appearing, the fact that a new tariff law has been enacted does not of itself create within the meaning of article 1389 of the customs regulations of 1908 an occasion where the "necessities or interests of the public service" require the ordinary business hours of customhouses to be prolonged.

## 3. SAME—CONSTITUTIONAL RIGHTS.

The fact that a collector at another port voluntarily kept his office open and received entries after the close of regular business hours of August 5, does not lay the foundation for the claim of an unlawful invasion of the constitutional rights of an importer under sections 8 and 9 of Article I of the Constitution of the United States.

United States Court of Customs Appeals, April 3, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7089 (T. D. 30890).

[Affirmed.]

*Brooks & Brooks* (F. W. Brooks of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The appellants in these cases imported various kinds of merchandise by the steamship *Pennsylvania*, which arrived within the limits of the jurisdiction of the collector of customs at the port of New York on the 5th day of August, 1909, as hereinafter more specifically stated. The tariff act of August 5, 1909, was signed by the President five minutes after 5 o'clock in the afternoon of that day. So far as relates to this case the act went into effect on the day following:

It is provided in section 29 of said act—

That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed

<sup>1</sup> Reported in T. D. 31483 (20 Treas. Dec., 680).

by this act and to no other duty, upon the entry or withdrawal thereof: *Provided, That* when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

The customhouse at the port of New York closed at 4.30 p. m. on August 5, according to its ordinary practice, authorized under article 1389 of the customs regulations of 1908, which reads as follows:

Customs offices shall be kept open for business on all days of the year, except Sundays, Independence, Christmas, and New Year's days and such other days as may be designated by law, or by the President of the United States, or by the Secretary of the Treasury, between the hours of 9 a. m. and 4.30 p. m., and these hours are to be prolonged when the necessities or interests of the public service require it.

The collector refused to permit entries of the merchandise to be made by appellants tendered during the usual business hours of August 5 on the ground that at the time no information had been received at the customhouse that the vessel carrying the same had arrived within the port and also refused to receive the money to pay duties thereon. Entry was accordingly made on the 6th day of August, 1909, and duties paid on all these importations under the terms of the act of 1909. Protests were duly filed, upon the hearing of which the Board of General Appraisers overruled the same and the cases come here for review.

The record shows that about 4 o'clock of the 5th day of August a representative of the appellant Adolph Kraut presented himself at the office of the collector of customs in New York with entry papers made in customary and proper form for the entering of the merchandise in question and had with him the money required to pay the duties on the importation under the tariff act of 1897, which entry and money he tendered. This was refused by the customs officials upon the ground that at the time no information had been received at the customhouse that the vessel had arrived within the port. This representative testified that when he made this tender he did not know where the vessel was, but that there had been a wireless report to the effect that the vessel would dock that night about 9 o'clock; that for all he knew the vessel may have been at the time out at sea, and that he took his entry to the customhouse on the chance that perhaps she might be within the port.

It does not appear that any tender of entry or offer to pay duty was made on behalf of the other appellants, and the United States claims that, whatever may be the rights of appellant Kraut under the facts of record, the same rights are not possessed by the other appellants so far as they are affected by an absence of proof of such tenders. It is said by the other appellants that the evidence in the Kraut case was to be considered as applying also to the other cases and that it was so treated by the board. In view of the fact that the board does appear to have assumed that all the evidence related to each case, it will be so treated here.

It is first claimed by appellants that the merchandise was dutiable under the tariff act of 1897 because the steamship carrying the same arrived within the jurisdiction of the collector of the port of New York before midnight of August 5 with intent to unload.

The fact of such arrival and intent can not be denied.

The provisions of section 29 of the act of 1909 would seem to require that entry of the importation should be made and duties paid before August 6 in order to admit of the assessment of duty in accordance with rates of the law of 1897. This was not in fact done, but it is claimed that the tender of entry and the offer to pay the duty was made under such circumstances that the refusal to accept the same by the collector was unlawful, and therefore that appellants should be considered as entitled to the same benefits as if the entry and tender had been accepted, thereby bringing the cases within the principle of *United States v. Legg* (105 Fed. Rep., 930).

In that case section 33 of the tariff act of 1897, which, for the purposes of these cases, is identical with section 29 of the present act, was under consideration. It there appeared that the importing vessel arrived at the port of New York prior to 11.50 a. m., July 24; that in accordance with the usual practice notice of her arrival was at that hour posted in the customhouse; that the act of 1897 did not take effect until 4.06 p. m. of that day; that the official and actual business hours of the customhouse ended at 4 p. m.; that the importer before that hour presented himself at the proper place and with the necessary papers to make an entry of the merchandise and the requisite money to pay the duties thereon under the act of 1894 and tendered both the entry and the payment of duties, which tender was refused by the collector on the ground that, as he claimed, the vessel had not made an entry in accordance with law.

It there appears to have been the claim of the collector that it was necessary for the master of the vessel to repair to the office of the collector of customs, report the arrival of the vessel, file a manifest, etc., as required by section 2774, United States Revised Statutes, before an importer owning merchandise upon said vessel was lawfully entitled to enter the same within the meaning of section 33.

The court disagreed with the collector in this regard, held that the goods imported were subject to duty when the vessel carrying the same arrived within the limits of the port, citing *Arnold v. United States* (13 U. S. (9 Cranch.) 119), and further held that the word "entry" referred to in section 33 meant the ordinary entry papers which the importer is required to file with the collector of customs, and that having duly presented himself and tendered his entry and the proper duties thereon under the act of 1894, the case should be disposed of as if the collector had received the entry prior to 4 p. m. of July 24.

In construing section 29 we have similarly held as to the meaning of the word "entry" therein. *United States v. Grossfeld*, 1 Ct. Custs. Appls., 189 (T. D. 31218).

The foregoing statement of the Legg case readily distinguishes it from the cases at bar because it there appears that the tender of entry and payment of duty was made *after* the vessel arrived in port, while in the cases now before us the undisputed facts show the vessel had not reached the limits of the port when the tenders were made.

The collector of customs was justified in refusing the offered entries at the time they were made because the goods covered thereby had not arrived within his jurisdiction. *United States v. Hartwell Lumber Co.* (142 Fed. Rep., 432), *United States v. Cordero*, 1 Ct. Custs. Appls., 107 (T. D. 31114).

But it is further contended that it was the duty of the collector at the port of New York to have kept his office open so that after the vessel did arrive in port the entry could be made and duty paid.

A fair consideration of this argument involves the inquiry as to the hour at which the steamship *Pennsylvania* in fact arrived within the port limits as well perhaps as to when the knowledge thereof reached not only the collector but the appellants' representative, and the fact must not be lost sight of that the time when the tariff act of 1909 became law was 35 minutes after the customhouse in New York, in the ordinary course of business and pursuant to departmental regulations, would close its doors.

There is nothing in the record, nor has our attention been called to any statute, decision, or ruling that defines the limits of the port of New York.

It appears, however, without dispute, that under the practice prevailing at that port, the first point at which the steamship *Pennsylvania* would enter the limits of the port would be when she crossed an imaginary straight line extending from Hoffmans Island to Gravesend Bay, a short distance northerly from Sandy Hook, and that her first natural stopping place within the port limits would be at quarantine, which is northerly from said imaginary line.

It is not questioned that she passed Sandy Hook at 10.25 and reached quarantine at 10.55 p. m. of August 5, which last-named place she left at 6.45 a. m. August 6, and docked later that day, but at just what time does not appear.

There is no doubt that by appellants and others it was understood that the *Pennsylvania* would probably enter the port sometime August 5, but there is nothing of record to show that they at any time that day possessed any *knowledge* of that fact, and indeed the evidence as to when she did enter the port limits was furnished by the customs officials, whose practice, it seems, was to keep advised of the approach of incoming vessels. The earliest information they are shown to have received of her approach was at 7.25 p. m. of August 5, when she was reported as southeast of Fire Island, which is, so far as we are able to ascertain, outside the port limits.

There is no evidence tending to show that any application was made on behalf of appellants to the customhouse officials or employees

August 5 to keep open so that an entry might be made of any of

the *Pennsylvania's* cargo. Their representative testified that he went to the customhouse twice that afternoon. The first time he informed the deputy collector that he had an entry on the *Pennsylvania* and asked him if he was prepared to accept payment of duties; that thereupon he was told that it would not then be accepted; that a telegram had been sent to Washington inquiring if duties should be accepted or the office kept open later than usual, and that he had better draw his money; that thereupon he procured the money and a few minutes after 4 o'clock again presented himself at the collector's office, made his offer of entry and payment of duty, and was told that they had heard from Washington and that they were to close up and not accept his entries or the duties thereon.

The deputy collector did not in the main disagree with this version of the matter, although he did not think any money was actually mentioned at either interview. The office, he testified, was closed at 4.30 p. m., because it was the usual hour for closing; because the Treasury Department in response to a request for direction in the matter had so advised; and also because no information had then been received at the customhouse that the *Pennsylvania* would arrive in port that day.

We have already held in the case of *Gallagher & Ascher v. United States* *supra*, p. 69 (T. D. 31034), that the provisions of article 1389 of the Customs Regulations establishing the hours of business at the customhouses to be between the hours of 9 a. m. and 4.30 p. m. are reasonable, and in the same case further decided that the mere fact that a new tariff law had been or was about to be enacted did not of itself create circumstances of such a character that it could be said that thereby the "interests of the public service" required the collector to keep his office open to an hour later than the usual closing hour in the regulations prescribed.

If it could be said that a request to the collector to keep his office open later than business hours would change the situation, it already appears that no such request was made in these cases. Evidently it was not made because the appellants' representative had no sufficient information as to the probable hour of arrival of the *Pennsylvania* within the port limits, and in addition to this, at the usual hour for closing the new tariff act had not become law, so that the urgency, if one existed, for an extension of the business hours could not have been apparent to the appellants or their representative before the usual hour for closing had arrived.

But the appellants claim notwithstanding all this that the rights secured to them under the provisions of sections 8 and 9 of Article I of the Constitution of the United States to the effect that all duties shall be uniform throughout the United States, and that no preference shall be given by a regulation of commerce or revenue to ports of one State over those of another, have been unlawfully invaded and devote much of their brief to a discussion of this claim.

Briefly stated, the facts that are claimed to warrant them to invoke these constitutional provisions are that the evidence shows that at the port of Boston on August 5, 1909, the customhouse was kept open for the receiving of entries and the payment of duties thereon until 8.30 p. m. of that day, and from a letter of the collector at that port to the Secretary of the Treasury, dated August 13, 1909, it appears that 44 entries were received at that office after the usual hour for closing had arrived. It also therein appears that the Boston collector's office was so kept open at the request of those expecting merchandise on three steamships due that day, one of which was overdue. The Boston collector so kept his office open without special authority of the Treasury Department, but reported to it on said 13th day of August that none of the entries had then been liquidated, that estimated duties only had been deposited, and that they were, therefore, subject to any such revision as to rates of duty as the department might direct.

It does not appear whether duties on these 44 entries were finally liquidated under the tariff act of 1897 or 1909.

It is not claimed that the tariff law of 1909 is not by its terms applicable uniformly throughout the United States nor is it claimed that any preference is therein attempted to be given by a regulation of commerce or revenue to the ports of one State over those of another, so that the constitutionality of the act itself is not challenged.

The claim really is, therefore, that the said customs regulations and the conduct of the public business as before set forth were such as to prevent the uniformity of the application of the new tariff act throughout the United States and to result in a preference being given by a regulation of commerce or revenue to the ports of one State over those of another.

We confess an inability to recognize any force whatever in this contention.

If the customhouse in New York had been kept open until 8.30 o'clock in the evening of August 5 the same rights, from the appellants' standpoint, would have been enjoyed and could have been exercised by them that were enjoyed and exercised by the importers at the port of Boston. But this could have afforded no relief for the appellants, because it already appears that at 8.30 p. m. on August 5 their importations had not arrived within the jurisdiction of the collector at the port of New York, and therefore, if opportunity so to do had been afforded them they would not have been entitled to make entry of the merchandise involved in these cases. The closing of the office at 4.30 p. m., therefore, affords no ground for any claim that because the collector's office at Boston was kept open to a later hour, the appellants' rights have been invaded. In this connection it may be observed that it does not appear whether the entries which were permitted to be made in Boston after 4.30 p. m. on August 5 were finally liquidated under the rates of duty imposed by the act



of 1897 or the act of 1909, so that neither a lack of uniformity nor the fact of preference is established.

But it is said further that in any event it was the duty of the collector of customs at New York to have kept his office open until midnight on August 5 so that appellants' entries could have been made before the act of 1909 took effect.

If it was the duty of the collector at the port of New York to pursue this course, it would manifestly be the duty of collectors at all the ports of entry throughout the United States to have done the same thing. Hence we are asked to read into the tariff act of 1909 a provision that such collectors were thereby required to keep their offices open and sufficient office force present to receive and attend to any entry of merchandise which might come into their jurisdiction before the 6th day of August, or, if not to read such a provision into the act, to say that by inference such was its effect.

Neither of these positions is tenable.

In section 29 Congress clearly provided under what circumstances importations should be subject to the rates of duty imposed under the new act and specifically provided that merchandise for which no entry had already been made should be dutiable thereunder. Congress will be presumed to have had cognizance of the methods of doing business under general regulations at the various customhouses within the United States, and had it designed to change the general course of business thereat it was easy to have given plain expression to such intention, which was not done. To infer that such was its intent requires a further inference that it is the duty of the collectors of customs throughout the United States to follow the course of legislation upon tariff matters to the end that they may correctly anticipate its outcome, so that if it shall happen that a new tariff act becomes law after the expiration of the prescribed and reasonable hours for doing business, their official force may be recalled and business resumed to meet the emergencies of the situation thereby created. Such a construction could only be required upon the theory that the necessities or interests of the public service require it, and as this court has heretofore said in the case of *Gallagher v. Ascher* (supra) "the public interests are what are expressed by the statute adopted by Congress \* \* \* and the courts can give no consideration to suggestions that it was the duty of the officials to do an unusual act which would be out of harmony with the import of the law."

The construction asked for would greatly interrupt the otherwise orderly and established methods of transacting public business and can not have been intended by Congress.

The judgments of the Board of General Appraisers in these several cases are *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

KNAUTH v. UNITED STATES (No. 137).<sup>1</sup>

## WALL POCKETS.—MANUFACTURES OF PAPER.

Flat cardboards, of different sizes and shapes, upon which lithographic prints have been mounted, and that have been imported in a "knocked-down" condition, but complete in themselves and ready to be assembled and used as wall pockets, are not to be deemed lithographic prints and dutiable as such; they have a new name and new use and were dutiable under paragraph 407, tariff act of 1897, as manufactures of paper.

United States Court of Customs Appeals, April 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6910 (T. D. 29762).

[Reversed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of paper cardboard upon which has been printed or pasted what are conceded to be lithographic prints, ornamental in design and color. It is divided into three classes: (1) Flat cardboards of different sizes and shapes, intended to be put together to form wall pockets and containing cheap attachments, such as thermometers, calendars, mirrors, pincushions, etc.; (2) the same as class 1, except that there were no attachments to the same; and (3) like flat pieces of cardboard of different sizes, not intended for use as wall pockets and free of attachments of any kind.

These wall pockets, counsel agree, were imported in a "knocked-down" condition, from which agreement and from the record we understand that they are complete and in condition to be assembled when imported. They are each composed of two pieces of cardboard upon which appears the lithographic printing; the back piece is the larger, has holes punched or cut therein suitable and designed to receive corresponding flaps, wings, or portions of the front piece that are shaped to be inserted therein and which hold the front and back together. This attachment of the front to the back piece results in a small receptacle being formed which is designated as a pocket, and hence the term "wall pocket" arises.

The collector assessed the merchandise for duty as "lithographic prints from stone, zinc, aluminum, or other material," under paragraph 400 of the tariff act of 1897, the pertinent provisions of which are as follows:

\* \* \* lithographic prints from stone, zinc, aluminum, or other material, on cardboard or other material, exceeding twenty one-thousandths of one inch in thickness, six cents per pound; \* \* \*

No question is made that if assessable thereunder the rate of duty is proper. The importers claim that the merchandise is dutiable as "manufactures of paper, or of which paper is the component material

<sup>1</sup> Reported in T. D. 31499 (20 Treas. Dec., 714).

of chief value," under paragraph 407 of the same act, or alternatively as "printed matter," under paragraph 403. These respective paragraphs read as follows:

407. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem.

403. Books of all kinds, including blank books and pamphlets, and engravings bound or unbound, photographs, etchings, maps, charts, music in books or sheets, and printed matter, all the foregoing not specially provided for in this act, twenty-five per centum ad valorem.

The Board of General Appraisers sustained the protests as to said class 1 and overruled the same as to the other two classes. The United States took no appeal. The importers appealed from the judgment of the board as to classes 1 and 2, but took no appeal as to class 3. The issues before us are whether the wall pockets mentioned in class 1 are dutiable under paragraph 407 or 403, and whether those mentioned in class 2 are dutiable under paragraph 400 or alternatively under paragraph 407 or 403.

The board thought the protests should be overruled as to all three classes of the merchandise; but, in view of the decision of the Circuit Court for the Southern District of New York in the case of *Knauth, Nachod & Kuhne v. United States* (155 Fed. Rep., 144), felt constrained to sustain the protests as to class 1. It is agreed that the merchandise described in class 1 is like that involved in the last-mentioned case.

The United States in the hearing before the board introduced a large number of witnesses whose evidence tended to show the articles in question were commercially known as lithographic prints; this was met by witnesses on behalf of the importers whose evidence tended to show that there was no such commercial designation of the merchandise, and the greater part of the record and of the briefs and arguments is devoted to this phase of the case.

The Board of General Appraisers in their decision said, relating to this contention, that—

Many witnesses were examined in this proceeding, and the Government has endeavored to prove by their testimony that the term "lithographic print" had a well-known, uniform, and general trade meaning, and that it included articles of the kind here in question. A careful reading of all the evidence in the case convinces us that there is no uniform and general trade understanding covering the term "lithographic print." It may be remarked, however, that it would seem impossible to establish terminology for a provision framed in the language of paragraph 400. The provision reads "lithographic prints from stone, zinc, aluminum, or other material." The expression is purely descriptive and not denominative, and we must therefore construe the provision according to the ordinary meaning of the words there used.

We have also carefully examined the record and concur in the conclusion of the board upon this issue.

As to the claim of the importers that the articles are dutiable as "printed matter" under paragraph 403, we think, as did the board, that these articles being lithographed and lithography being a kind of printing, concerning which fact there is no controversy, if this case were to be determined by deciding whether the merchandise should be classified under paragraph 400 or under paragraph 403 it must be held

that the provisions in paragraph 400 for "lithographic prints from stone, zinc, aluminum, or other material, on cardboard or other material," is more specific than the provisions in paragraph 403 for "printed matter, \* \* \* not specially provided for," and that the merchandise here, being lithographic prints of the kind specified in paragraph 400 and upon cardboard that is within the provisions of that paragraph, it would be dutiable thereunder rather than under paragraph 403.

The question of whether they are dutiable as lithographic prints or as manufactures of paper, or of which paper is the component material of chief value, not specially provided for, is more perplexing.

The question of chief value was not made an issue before us. There is no finding of the board on that point, but the record shows that the importers testified unequivocally that in all these wall pockets the paper was the chief value.

The wall pockets themselves are aptly described by the word novelties. Indeed, several witnesses so characterized them; some also referred to them as lithographic novelties, and others, apparently having in mind similar articles advertising something, referred to them as advertising novelties. By their fancy, decorated appearance, which is to a certain degree ornamental, they are designed to be attractive, and in that they contain a receptacle for small articles, they are also useful. The front and back pieces of the wall pockets before being prepared to fit each other are similar in some respects to the articles involved in *United States v. Tate* (1 Ct. Custs. Appls., 434), heard at the December (1910) session of this court, in which case opinion is concurrently filed. The merchandise there is held dutiable as lithographic prints. It will be seen, however, that those prints, although intended to be used as box tops, in fact had never assumed the shape or form of a box top, but were flat pieces of surface-coated paper lithographically printed, and the case does not find them to be susceptible of any other use.

The articles here are imported in a "knocked-down" condition, ready to put together, each piece designed and adapted to fit its companion, and when assembled the two pieces make the completed article which has for its specific name "wall pocket."

It is urged by the United States that when imported these wall pockets are in the shape of flat pieces of lithographically printed cardboards and should be assessed as such. But it has been decided that articles designed and suitable to be assembled to constitute a new product when imported together by the same person at the same time are properly classifiable for duty as the new product. *Isaacs v. Jonas* (148 U. S., 648); *Park & Tilford v. United States*, supra, p. 34 (T. D. 31006).

The two parts of each wall pocket appear to have been partially attached before importation, counsel on both sides so assume, and we dispose of the case, so far as that feature of it is concerned, in the same way it would be disposed of had these wall pockets been completely united and in shape for use before being imported instead of being in a "knocked-down" condition.

Are these wall pockets manufactured articles? They are composed of two pieces of paper cardboard united in such a manner as to form a receptacle. They are also composed of lithographic prints or of such prints mounted on paper cardboards, which is the same thing. They have been cut to shape and form, designed to produce, when united, certain appearances and results, one of which is a pocket, and when united and placed in position the intended appearances and results are produced. The wings, flaps, or other parts of each front piece have been prepared to enter the holes or perforations of the back piece designed to receive the same. Neither part appears to have any use after being so manipulated and treated except when joined to the other, and when united they serve a definite and new purpose and one which as lithographic prints or pieces of cardboard they could not serve until manipulated.

The amount of labor required for the processes referred to is undoubtedly small, but the articles themselves do not appear to be of large value, and the stability of the construction of the wall pockets is not great.

The work required to produce an article need not be large, and a small amount often changes the classification. *Saltonstall v. Wiebusch* (156 U. S., 601).

It is true that the completed wall pocket retains the ornamental and attractive features of the lithographic prints, but it has become a new article, taken on a new name, and is subject to a new use.

It is urged in argument that this use is inconsequential, and that though the completed articles are wall pockets, their use in that capacity is an incident to the main purpose of the lithographic prints; but we can not say as a matter of law that this is so. For aught that appears, the useful feature of the pocket may contribute equally or more to the salable quality of the article than do the lithographic prints thereon.

The constituent parts of these articles have passed beyond the stage of lithographs; the treatment to which the back pieces have been subjected has in some degree mutilated the surfaces of the prints thereon, and we hold that the completed wall pocket is a manufactured article. *Hartranft v. Wiegman* (121 U. S., 609); *Rossman v. United States* supra, p. 280 (T. D. 31321); *Knauth v. United States* (155 Fed. Rep., 144); *Kraut v. United States* (142 Fed. Rep., 1037).

It already appears that paper is the component material of chief value, and it follows that the merchandise is dutiable under paragraph 407 of the act of 1897.

That part of the judgment of the Board of General Appraisers appealed from is therefore affirmed as to the merchandise involved in class 1 and reversed as to the merchandise involved in class 2, as hereinbefore described, and reliquidation ordered in accordance with the views herein expressed.

MONTGOMERY, Presiding Judge, and SMITH and DE VRIES, Judges, concur.

SHAW v. UNITED STATES (No. 156).<sup>1</sup>

## APPLICATION OF FAVORED-NATION CLAUSE TO TRADE CONVENTIONS.

By a convention of December 22, 1815, the terms of which, through subsequent agreements, remain in full force and effect, it was stipulated by and between the United States and His Britannic Majesty that "no higher or other duties shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of His Britannic Majesty's territories in Europe \* \* \* than are or shall be payable on the like articles being the growth, produce, or manufacture of any other foreign country." In pursuance of a provision contained in the tariff act of 1897, looking to the arrangement of commercial agreements in which reciprocal and equivalent concessions might be secured in favor of the products and manufactures of the United States, a commercial agreement between the United States and the Republic of France was negotiated and proclaimed June 1, 1898, in which it was reciprocally agreed that during the life of the agreement certain articles named therein should be admitted at designated rates on importation from one of the countries to the other. Among the articles so designated brandies or other spirits manufactured or distilled from grain or other materials were to be subject to a duty of \$1.75 per gallon. The appellants subsequent to the date of this trade agreement with France imported into the United States from England certain whiskies and other spirituous liquors, and assert here that the favored-nation clause in the existing convention between this country and Great Britain applies and that they are entitled to an allowance on their importation from England of the same rate of duty they would be entitled to if their importation had been brought in from France, namely, \$1.75 per gallon. The goods were assessed at the port of New York at \$2.25 per proof gallon, under paragraph 292, tariff act of 1897. *Held*, a reciprocity agreement is based on reciprocal considerations moving from each party thereto to the other, separate obligations being assumed in return for benefits granted; and other countries, not parties to the agreement, bearing in no sense the burden of the obligations, can not properly be taken to share in the accruing benefits. It would be, in the case at bar, to concede to Great Britain without a consideration what was conceded to France only on a consideration if these goods were permitted entry at the rate fixed in the French agreement; and the consignment was dutiable as assessed under paragraph 292, tariff act of 1897.—*Bertram v. Robertson* (122 U. S., 116) and *Whitney v. Robertson* (124 U. S., 190).

United States Court of Customs Appeals, April 10, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstracts 22091 and 22116 (T. D. 30099).

[Affirmed.]

*Hatch & Clute* (*Edward S. Hatch* and *Walter F. Welch* of counsel) for appellants.  
*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This importation consists of whisky and other spirituous liquors imported by A. D. Shaw & Co. and others, of New York, from England, and entered at that port.

<sup>1</sup> Reported in T. D. 31500 (20 Treas. Dec., 718).

The collector assessed duty thereupon at the rate of \$2.25 per proof gallon under paragraph 292 of the tariff act of 1897. This importer, with others, protesting against that assessment, claims the merchandise subject to duty at the rate of \$1.75 per proof gallon, which is the duty imposed upon like merchandise from France, Germany, and other foreign countries under certain reciprocity treaties with those countries in force at the time of this importation and exchanged under and by virtue of section 3 of the tariff act of 1897.

The essence of the claim is that under the most-favored-nation clause of the convention of commerce and navigation of July 3, 1815, between the United States of America and His Britannic Majesty, which was continued in force for 10 years by Article IV, treaty of 1818, and indefinitely extended by the convention of August 16, 1827, importations from the Kingdom of England are entitled to be entered at the same rate of duty levied upon such merchandise when imported from France and the other countries with whom such treaties have been executed.

Article 2 of the convention to regulate the commerce between the United States and the territories of His Britannic Majesty, dated July 3, 1815, and proclaimed December 22, 1815, is, in its pertinent part, as follows:

ART. 2. No higher or other duties shall be imposed on the importation into the United States of any articles, the growth, produce, or manufacture, of his Brittanic Majesty's territories in Europe, \* \* \* than are or shall be payable on the like articles being the growth, produce, or manufacture, of any other foreign country;  
\* \* \*

The treaties with France, Germany, and Italy, forming the basis of the importers' claim here, were negotiated and put into effect by the President of the United States under and by virtue of the authority of section 3 of the tariff act of 1897, which in its applicable parts is as follows:

SEC. 3. That for the purpose of equalizing the trade of the United States with foreign countries, and their colonies, producing and exporting to this country the following articles: \* \* \* brandies, or other spirits manufactured or distilled from grain or other materials; \* \* \* ; or any of them, the President be, and he is hereby, authorized, as soon as may be after the passage of this act, and from time to time thereafter, to enter into negotiations with the governments of those countries exporting to the United States the above-mentioned articles, or any of them, with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; and whenever the government of any country, or colony, producing and exporting to the United States the above-mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this

act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows, namely:

\* \* \* \* \*

Brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon.

\* \* \* \* \*

The constitutionality of a somewhat similar section of the act of 1890 having been assailed was affirmed by the Supreme Court. In that case the court in an elaborate opinion points out the difference between a delegation to the President of a legislative power, wherein *he* is to determine the provisions and terms of a law, and the enactment by Congress of a law, or substitute law, and providing, as in this case, that the President shall, upon the ascertainment of certain facts or upon the consummation of certain things by him or otherwise, determine and proclaim the date when the law in effect shall be suspended, or the substituted law previously enacted by Congress shall take effect. The latter class of legislation, including many laws enacted by Congress from the foundation of the Government, are not inhibited as delegations of legislative authority. *Field v. Clark* (143 U. S., 649).

Typical and substantially identical with all of these so-called reciprocity treaties is that with France of May 28, 1898, duly proclaimed by the President of the United States May 30, 1898, to take effect June 1, 1898. It provided:

Protocol of the reciprocal agreement between the Government of the United States of America and of the French Republic \* \* \*.

The Government of the United States and the Government of France being animated by the same spirit of conciliation and being equally desirous to improve their commercial relations, have concluded the following agreement:

#### I.

It is agreed on the part of France that during the continuance in force of this agreement the following articles of commerce, the product of the soil or industry of the United States, shall be admitted into France at the minimum rates of duty, to wit, not exceeding the following rates:

[Here follows schedule.]

#### II.

*It is reciprocally agreed* on the part of the United States in accordance with the provisions of section 3 of the United States tariff act of 1897 that during the continuance in force of this agreement the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

\* \* \* \* \*

On brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon.

\* \* \* \* \*

By its terms ("it is reciprocally agreed") the treaty is one of mutual consideration and concession.



The claim of the appellants is that the concession by the United States to the French Republic of the rate of \$1.75 per proof gallon upon such merchandise imported from that republic is a special favor within purview of the treaty of July 3, 1815, with His Britannic Majesty, and that the last-named treaty is self-executing and, therefore, under the Constitution of the United States, the law of the land, and per force thereof and the things recited reads into the tariff law of 1897 an exception thereto in favor of the importations of such merchandise from the Kingdom of Great Britain.

Appellants have accordingly protested against the rate of duty assessed by the collector at the port of New York of \$2.25 per proof gallon upon these importations. The Board of General Appraisers overruled the protests.

There is no testimony in the record, the facts being admitted, and the objections of the Government, appellee, come in the nature of a demurrer to the sufficiency of the protests, wherein are fully alleged all the material facts. Almost the precise question has been presented to the Supreme Court of the United States and decided. These appellants, however, insist that under the facts alleged in their protest such differences of law and fact exist as entitle them to a decision.

The question presented involves the consideration of the relative import of treaties and statutes.

The relative force and effect of each is defined by Article VI, paragraph 2, of the Constitution of the United States, as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The general rule, as laid down by the courts, is that they are bound to give treaties the same effect as the fundamental law of the land as they do the provisions of the laws of Congress. They are denominated "the supreme law of the land." *United States v. The Peggy* (1 Cranch., 103); *Strother v. Lucas* (12 Pet., 410, 439); *Foster v. Neilson* (2 Pet., 253, 314). Where, however, by its terms, a treaty speaks in the nature of an executory promise it is the rule that it is not self-executing, and before it can be given the same force and effect as the law of the land, action by Congress so legislating must be had.

The expression of the highest court in this particular is perhaps more succinctly stated in the case of *Foster v. Neilson* (2 Pet., 27 U. S., 253, 314) by Chief Justice Marshall, as follows:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—*when either of the parties engages to perform a particular act*—the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court.

If, therefore, the most-favored-nation clause of the treaty of 1815 with Great Britain is not self-executing, all questions affecting the enforcement of any alleged rights thereunder are political and for the legislature or executive, and are not the concern of, or within the jurisdiction of, the courts. That question, however, we deem unnecessary of determination here. In this we follow the precedents established by the Supreme Court.

The question first arose in the case of *Bertram v. Robertson* (122 U. S., 116). Mr. Justice Field delivered the opinion of the court. The commercial treaty between the United States and the Kingdom of Denmark concluded April 26, 1826 (8 Stat., 340), afterwards abrogated but subsequently renewed in all relevant parts on the 12th of January, 1858 (11 Stat., 719), in the first article declared that—

The contracting parties, desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage, mutually, not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, *who shall enjoy the same freely, if the concession were freely made, or upon allowing the same compensation, if the concession were conditional.*

The fourth article declared that—

No higher or other duties shall be imposed upon the importation into the United States of any article the produce or manufacture of the dominions of His Majesty the King of Denmark, and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States than are or shall be payable on the like articles being the produce or manufacture of any other foreign country.

The treaty or convention between the King of the Hawaiian Islands and the United States, concluded January 30, 1875, ratified by Congress May 31 following (19 Stat. at Large, 625), in the first article declared that—

For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands, *and as an equivalent therefor*, the United States agree to admit all of the articles named in a specific schedule, the same being the growth, produce, and manufacture of the Hawaiian Islands, into all the ports of the United States free of duty.

Then follows the schedule, which, among other articles, includes brown and all other unrefined sugars and molasses.

The second article declared that—

*For and in consideration of the rights and privileges granted by the United States of America in the preceding article, and as an equivalent therefor*, the King of the Hawaiian Islands agrees to admit all the articles named in a specified schedule which are the growth, manufacture, or produce of the United States of America into all the ports of the Hawaiian Islands free of duty.

Then follows the schedule mentioned.

The fifth article made further reciprocal concessions upon the part of the Hawaiian King as a part of the considerations moving the treaty.

Accordingly due proclamation was made by both Governments.

Certain merchants doing business in the city of New York there-  
- imported a cargo of sugar at that port, and as the same mer-

chandise was the subject of the treaty with the King of the Hawaiian Islands, and therefore admitted under that treaty free of duty into the United States, protested the assessment of duties thereupon by the collector at the port of New York at the rate provided generally under the then existing tariff law, and made claim that per force of the most-favored-nation provisions in the treaty with the King of Denmark they were likewise entitled to have free entry of their similar merchandise.

The Supreme Court of the United States held against the claimants. In part the court said:

Those stipulations, *even if conceded to be self-executing* by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. \* \* \* But they were not intended to interfere with special arrangements made with other countries founded upon a concession of special privileges. \* \* \*

*Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions.*

It is claimed by the appellants here, however, that the provisions of the Danish treaty calling for the same concessions if similar concessions were made by the Kingdom of Denmark which had been made by the King of Hawaii to the United States expressly committed by *contractual force* the Danish Government to compensation before they could demand of this Government the privileges granted the King of the Hawaiian Islands; and that the situation here is different, being more akin to that the subject of consideration by the Supreme Court of the United States in the case of *Whitney v. Robertson* (124 U. S., 190), wherein there was in effect no contractual estoppel, that clause, italicized, *supra*, not appearing in the treaty with the King of Great Britain.

That case arose out of the importation from Santo Domingo into the United States of "centrifugal and molasses sugars."

The basis of the claim by the importers was also the same reciprocal treaty made with the King of the Hawaiian Islands and the subject of consideration in the *Bartram* case. The treaty with Santo Domingo, however, differed from that between the United States and the Danish King and was in the pertinent provisions almost identical in terms with the treaty of 1815 with His Britannic Majesty.

The ninth article of the treaty with the Dominican Republic was as follows:

No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States, or their fisheries, that are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries. (15 Stat., 473-478.)

Counsel for the importers in that case made in part the same claim here asserted, that the omission in the treaty with the Republic of Santo Domingo of an express stipulation as to free concessions and conces-

sions upon compensation entitled them to a decision, and maintained that that omission precluded any concession in respect to commerce and navigation by our Government to another country without that concession being *ipso facto* extended to Santo Domingo.

The Supreme Court, however, held that the difference in the treaty stipulations was without significance, and speaking of the Danish treaty, which is substantially identical with that of the British convention here under consideration, said:

It was never designed to prevent special concessions, upon sufficient considerations, touching the importations of specific articles into the country of the other.

The court then proceeded to pronounce what it deemed another clearly insuperable objection to the pretensions of the appellants. It stated:

\* \* \* There is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing—that is, require no legislation to make them operative—to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions so far as they bind the United States, or supersede them all together. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent the one last in date will control the other, provided, always, the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the Government and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress.

In other words, the court held that if the Dominican treaty was self-executing, the tariff act, having been passed later, amended the treaty, and being the latest expression of law was controlling if the two were inconsistent. If the treaty were not self-executing and Congress had passed no legislation carrying the same into effect, in that event the act of Congress would control, even though enacted prior to the signing and promulgation of the treaty. In such cases redress or reclamation could only be had by addressing itself to the executive head of the Government. In other words, the remedy would be political. So that the court concluded that, admitting that the tariff act was in contravention with the terms of the Danish treaty, and particularly the most-favored-nation clause therein, hav-

ing been passed later, it either superseded as law the Danish treaty, if the same were self-executing, or, if it were not self-executing, the remedy was political.

Counsel for the appellant here insists that because the court in the Whitney case rested the decision upon these two grounds the former was *obiter* and the latter the decision of the court. We think a careful reading of the decision of the court will show that both are laid as equally positive objections to the claims of the plaintiff there; that is to say, the court held, first, that the reciprocity treaty with the King of the Hawaiian Islands, being made for a consideration and based upon mutual concessions, was in no sense a violation of or contrary to the stipulations of the most-favored-nation clause of the Danish treaty; and, secondly, if it were a violation of the Danish treaty, the remedies would be purely political and therefore not the subject of judicial cognizance.

The treaty with his Britannic Majesty of July 3, 1815, was the subject of legislation by Congress upon the exchange of signatures. Being presented to the Senate for confirmation by the President in the Fourteenth Congress, the House of Representatives took the position that without legislation by both branches of the Congress the treaty would be without validity, as without it would be self-executing only. After much interchange between the Senate and House, finally on March 1, 1816, an act was agreed upon by the two Houses and was passed and the treaty was enacted a law.

The question, therefore, is presented in this case for the consideration of this court whether or not section 3 of the tariff act of 1897 was in conflict with the most-favored-nation clause of the treaty of 1815 with His Britannic Majesty. We think not.

Section 3 of the tariff act of 1897 was a general law; its attitude toward every nation was uniform. It offered no special favor to France, or Germany, or Italy, or any other country. Every foreign nation was treated alike by the terms of the law. It was equally within the opportunity of England to negotiate a reciprocity treaty as it was within the opportunity of France. The act itself in this particular was but a uniform authorization, means to effect the purpose, that was executed in the Danish Treaty, the subject of consideration in the Bartram case. The two high contracting parties had by signed treaty in that case effected no more than what Congress had authorized with every nation by section 3 of the act of 1897. If, therefore, as held in the Bartram case, that which was executed did not amount to any infraction of the most-favored nation clauses in treaties with other sovereignties, it can not be said that that which authorized no more and no less could amount to such an infraction.

Moreover, we think that in logic or effect the negotiation of a treaty upon a consideration does no violence to that treaty provision with His Britannic Majesty. The reciprocity treaty with France is one founded upon mutual considerations. This country gave considerations for the considerations given in exchange therefor by France. If,

therefore, this country should concede to Great Britain *without* consideration what it has conceded to France *for* consideration, it would not be conceding to England a favor it conceded to the other country, but it would be conceding to England more than it conceded to the other country, because England in such case gives no consideration for the concession for which France gave a consideration.

The extension of the \$1.75 rate upon spirituous liquors in this case to England without any mutual concession therefrom would be conceding not what was conceded France, but something more than that which was conceded France, and, therefore, can not be within purview of the most-favored-nation clause of the treaty with His Britannic Majesty without consideration, which has not been given.

We think the Bartram and Whitney cases, cited and quoted, *supra*, conclusive of this case. If the convention of 1815 with His Britannic Majesty in the particulars considered was *per se* executing, or was by the legislation stated executed, it does not contemplate, and is not contravened by, treaties based upon mutual considerations such as the reciprocal convention of May 28, 1898, with the Republic of France. If the treaty with His Britannic Majesty is not self-executing, or if it has not been executed by the legislation of Congress noted, the question is not one for the courts, but is a political one for the legislative and executive departments of the Government.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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UNITED STATES *v.* TATE (No. 162).<sup>1</sup>

LITHOGRAPHIC PRINTS—SURFACE-COATED PAPER.

Thin, flat pieces of surface-coated paper, with pictures or designs lithographically printed thereon, and of such dimensions as to admit on proper manipulation of being made into box covers and designed for that use, are classifiable either as surface-coated papers printed under paragraph 398, or as lithographic prints under paragraph 400, tariff act of 1897. Conformably, however, to section 7 of that act requiring the higher rate to be imposed, they are dutiable under paragraph 400 as lithographic prints.—*Devoy v. United States* (147 Fed. Rep., 765) distinguished.

United States Court of Customs Appeals, April 11, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22161 (T. D. 30122).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

*D. Macon Webster* for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue here is whether certain so-called box tops made of paper, under 0.008 of an inch in thickness and lithographically printed, are

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<sup>1</sup> Reported in T. D. 31501 (20 Treas. Dec., 726).

dutiable as surface-coated papers printed, under paragraph 398 of the tariff act of 1897, or as lithographic prints, under paragraph 400 of that act.

As there is no claim made that the Board of General Appraisers erred in its finding of fact as to the characteristics of the importations, we quote therefrom:

We find from the testimony offered in these cases that the goods are paper articles designed for the covering of boxes and made by lithographically printing a picture or design upon surface-coated paper. As imported each picture or design is a separate article shaped or adapted for a box of a particular size, and designed to be cut out and folded to form the top and sides of a box cover.

The collector had assessed the importations under paragraph 400. The board, feeling bound to follow the decision of the circuit court in *Devoy v. United States* (147 Fed. Rep., 765), in which case the same question was involved, sustained the protest and held the merchandise dutiable as surface-coated paper not specially provided for.

In some cases decided by it before the *Devoy* case was decided in the circuit court the board had apparently held like articles to be dutiable as lithographic prints.

So far as appears in this case the merchandise is not commercially designated either as surface-coated paper or as lithographic prints, but we think the evidence shows its commercial designation to be box tops, for which it is conceded there is no *eo nomine* provision in said tariff act.

It is conceded that before being subjected to the lithographic processes the paper used was surface-coated paper, and the result of such processes has been to print thereby certain pictures or designs thereon.

The pertinent provisions of the respective paragraphs are as follows:

398. Surface-coated papers not specially provided for in this act, two and one-half cents per pound and fifteen per centum ad valorem; if printed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, three cents per pound and twenty per centum ad valorem. \* \* \*

400. Lithographic prints from stone, zinc, aluminum or other material, bound or unbound (except cigar labels, flaps, and bands, lettered, or otherwise, music and illustrations when forming a part of a periodical or newspaper and accompanying the same, or if bound in or forming a part of printed books, not specially provided for in this act), on paper or other material not exceeding eight one-thousandths of one inch in thickness, twenty cents per pound; \* \* \* lithographic prints from stone, zinc, aluminum or other material, on cardboard or other material, exceeding twenty one-thousandths of one inch in thickness, six cents per pound. \* \* \*

In the *Devoy* case the board held the merchandise to be lithographic prints. Further evidence was taken in the circuit court which tended to show that it was commercially designated as surface-coated paper, and we infer the decision of the circuit court was based upon the

ground that the articles were commercially known as surface-coated paper and not lithographic prints. There being no such commercial designation shown here, we do not consider that decision, which reverses the board without any discussion of the case, an authority on the issue before us.

It is obvious that to produce a lithographic print there must be some object used capable of receiving and retaining the impression and other effects of the lithographic processes. It appears from the evidence that a large proportion of whatever articles are used for this purpose is surface-coated paper.

The articles involved in this case, as appears by the official exhibits before us and by the testimony, are thin, flat pieces of surface-coated paper of different sizes, the largest being approximately 11 by 12 inches, some being much smaller, and all of such dimensions as to enable them by proper manipulations to be made into box covers, upon the tops or sides or both of which when made into covers the results of lithography, namely, pictures or designs, appear. We are unable to see why they are not lithographic prints in fact within the meaning of paragraph 400. Indeed, it is not suggested by counsel that they are not lithographic prints, nor is it pointed out how any lithographic prints made on surface-coated paper could for tariff purposes be lithographic prints if these are not. On the other hand, it is manifest that these pieces of paper are surface-coated papers, printed, and we think they may be classified under either paragraph.

It might with much force be urged that the term lithographic prints in paragraph 400 is, in view of the apparent design of Congress as manifested thereby to include therein all the lithographic prints enumerated whether upon paper or cardboard, a narrower provision than the term surface-coated papers, printed, in paragraph 398; and that the word *printed* in paragraph 398 refers to printing generally, while paragraph 400 refers specifically to the products of lithographic printing.

In the case at bar we infer, from the record, the attitude of parties, and arguments advanced, that so far as relates to the merchandise under consideration the rate provided in paragraph 400 is higher than that in paragraph 398, and it being classifiable under either paragraph, we prefer to rest our decision of the case upon the provision in section 7 of the act of 1897 that—

\* \* \* If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

The judgment of the Board of General Appraisers is therefore *reversed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.



MALOUF v. UNITED STATES (No. 191).<sup>1</sup>

## 1. WHEAT THAT HAS BEEN BOILED, DRIED, AND GROUND OR OTHERWISE BROKEN.

Wheat that has been boiled, dried, and ground or otherwise broken, constituting thereby a food product, has lost its character as a grain and takes on a form, nature, appearance, and use differing distinctly from those it had before being subjected to the described treatment, and it can not be properly classified as wheat, or by similitude as wheat.

## 2. SAME—HOW DUTIABLE.

It would seem this commodity has no commercial designation, but it is manifestly a foodstuff manufactured from wheat, and as such was dutiable under section 6, tariff act of 1897.

United States Court of Customs Appeals, April 10, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22592 (T. D. 30294).

[Affirmed.]

*Walden & Webster* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

A certain article of merchandise entered at the port of New York was assessed for duty by the collector as a nonenumerated manufactured article under the provisions of section 6 of the tariff act of July 24, 1897, which reads as follows:

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

The importers protested against the action of the collector and as their special ground of objection to his classification and the duties imposed set up that the importation was dutiable as wheat either directly or by similitude under the provisions of paragraph 234, which is as follows:

234. Wheat, twenty-five cents per bushel.

The Board of General Appraisers overruled the protest and the importers appealed.

On the hearing before the board the importers introduced evidence from which it appears that the merchandise in question is prepared from wheat. The grain is first boiled, then dried, and finally ground in a mill or otherwise broken. So treated the article is ready for the market and constitutes a food product which is cooked and eaten principally by Syrians.

<sup>1</sup> Reported in T. D. 31502 (20 Treas. Dec., 729).

The importers contend, first, that the merchandise is in fact wheat; second, that it is commercially known as wheat; and third, that if it is not wheat it is similar in use to wheat and therefore dutiable as such. We can not agree with the importers. The article under consideration, it is true, was originally wheat, but as the result of mechanical and other processes to which it was subjected prior to importation it lost completely its characteristics as a grain and took on a form, nature, use, and appearance distinctly different from that which it had prior to treatment. Wheat is made up of a germ surrounded by a white, starchy substance designed to furnish temporary nutriment to the germinating principle and of the bran or layers of tissue which envelop both germ and nutrient. By cooking, drying, and grinding the original grain, the germ was of course killed, the cells of the starch were broken, and the bran or enveloping tissues removed. As a result the availability of the grain for flour and its quality and efficiency as seed were entirely destroyed. More than that, after these processes had been completed, all that was left of the wheat in effect was the starchy substance, altered in physical structure at least and, with the exception that it was a starchy substance, having neither the appearance nor qualities of wheat. Indeed, an examination of the samples, which are hard, gritty, translucent, and yellowish in color, no more produces the impression or mental picture of wheat than would crushed amber.

As to whether the product can be classified by similitude as wheat by reason of similarity of use, it is sufficient to say that it can not be used either for the purpose of making flour or as wheat seed, the particular and principal uses to which wheat is dedicated. It can of course be used as a starchy food, but in that particular it is no more similar to wheat than it is to rice, oats, barley, rye, or any other grain utilized for food purposes. In use it bears no more similitude to wheat than does flour or shredded wheat, which are not wheat at all, but manufactures of wheat.

The importers produced two witnesses to prove commercial designation, but only one of them, S. F. Zaloom, was at all competent to testify on the subject. He stated that he had dealt at wholesale and retail in the article which is the subject of appeal for a period of about 15 years and that in the year 1897, and prior thereto, it was generally known and bought and sold as "crushed wheat." He further declared that it was so called by Syrians who bought it and that the Syrian name for the article was "bulgus," which means wheat. This evidence does not establish commercial designation. In it there is nothing which shows that the witness knew or was in a position to know what name was applied to the merchandise by the *trade of the country*, much less that it was definitely, uniformly, and generally known to that trade as "crushed wheat." In fact, there is nothing in the testimony of Mr. Zaloom which is at all convincing that he was

testifying to anything more than his personal practice and the practice of those who dealt with him or at most the practice and custom which may have prevailed in the locality of his particular business. It would be stretching the testimony of this witness very considerably to say that it showed that the article was definitely, uniformly, and generally, and not partially or locally known as "crushed wheat." From all that appears from the evidence it may have been known by some other designation in other parts of the country.

The importation is an article distinct in character and use from the material out of which it was made and in our opinion is a foodstuff manufactured from wheat. It was therefore dutiable as assessed.

The decision of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

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UNITED STATES v. GAGE BROS. (No. 229).<sup>1</sup>

1. WEIGHTS DETERMINED BY CUSTOMS OFFICIALS—PRESUMPTION.

In the absence of material evidence to the contrary, the method employed by customs officials to determine the weight of commodities will be presumed to be correct.

2. SAME—SILK-VELVET RIBBONS AND WOVEN-SILK FABRICS.

The commodities in controversy were silk-velvet ribbons and woven-silk fabrics. The importers having failed to show that the customs officials weighed as a test an insufficient quantity of the goods, or that the percentage actually weighed was not properly stripped, or that the weight of the percentage that had been properly stripped before weighing was incorrectly reported, or that the method employed to select, strip, and weigh the goods was ill adapted to secure a result at least approximately correct, the official weights as reported will be here presumed to be correct, and this importation was properly assessed for duty at \$1.50 per pound and 15 per cent ad valorem under paragraph 386, tariff act of 1897.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23284 (T. D. 30615).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

*Lester C. Childs* for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain silk velvet ribbons and woven silk fabrics were entered at the port of Chicago in the months of January, February, March, and April, 1909. The ribbons were assessed for duty at \$1.50 per pound and 15 per cent ad valorem under the provisions of paragraph 386 of

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<sup>1</sup> Reported in T. D. 31503 (20 Treas. Dec., 731).

the tariff act of July 24, 1897. Some of the woven silk fabrics were assessed for duty at \$3.25 per pound and some of them at \$4.50 per pound under the provisions of paragraph 387 of the same act.

The importers protested that the weights as found by the appraiser were in excess of the true weights of the merchandise, that the method followed by the appraiser for ascertaining the weights was insufficient for the purpose, and that the weights of the goods as shown on the invoices were correct and should have been accepted by the customs officers as the proper basis for the assessment of duties. The Board of General Appraisers sustained the protest and the Government appealed.

The only issue raised by the appeal is whether the weights ascertained by the customs officer and the methods employed in ascertaining them were correct. The record in the case is very confused, and to derive from it the facts upon which this issue was submitted to the Board of General Appraisers is attended with some difficulty. As far as we can gather, there is no satisfactory evidence which shows that the weight of the silk velvet ribbon as found by the appraiser was incorrect or that his method of ascertaining it was either improper or inept for the purpose. The weights of the ribbon per piece as found by the appraiser on entry No. 3474 were as follows:  $6\frac{3}{4}$  ounces for widths of 36 lignes,  $7\frac{1}{4}$  ounces for widths of 40 lignes,  $7\frac{3}{4}$  ounces for widths of 42 lignes, and  $8\frac{1}{4}$  ounces for widths of 48 lignes. As against the correctness of these weights the importers contented themselves with offering in evidence weights found by the appraiser on a previous importation of what was claimed to be similar merchandise. The weights per piece ascertained and reported by the appraiser on this previous importation were as follows:  $6\frac{3}{4}$  ounces for widths of 36 lignes,  $6\frac{1}{4}$  ounces for widths of 40 lignes,  $7\frac{3}{4}$  ounces for widths of 42 lignes, and  $8\frac{3}{4}$  ounces for widths of 48 lignes.

A comparison of the weights reported on entry No. 3474 with those reported on the previous importation discloses a difference of 1 ounce as to the widths of 40 lignes and no difference at all as to the other three widths. Even if the weights of the one importation differed completely from those of the other, that fact standing by itself would not show that the customs officers charged with the duty of weighing the ribbons of the present importation either improperly weighed them or incorrectly reported their weights, first, because there is no satisfactory evidence that the goods of both importations were identical in every particular which might have affected their weights; second, because there is no evidence to show that the weights of the previous importation were ascertained by a method more adequate to the purpose than that followed in the present importation or that the appraiser was less accurate, careful, or certain in ascertaining the weights of the present importation than he was in determining those of the previous

one; and third, because a mere variance of weights tends to prove nothing more than that the ribbons of one importation differed in weight from those of the other. There is nothing in the record from which it can be determined definitely what number of pieces of ribbon were weighed. The fact that the appraiser reports that ribbons of a certain width had a certain weight does not prove that only one piece of that width was weighed.

As to the woven silk fabrics, the importers offered the testimony of Thomas H. Trimble, who testified that he caused six pieces of the goods to be weighed by the city sealer, and that one of them, "Tan 2," containing  $15\frac{1}{2}$  yards, weighed 9.77 ounces, as against 10.14 ounces reported by the appraiser, and that "Mulberry 2," containing  $15\frac{1}{2}$  yards, weighed 8.68 ounces, as against 10.36 ounces, the weight officially found. "Pink,"  $15\frac{1}{2}$  yards, weighed 8.75 ounces; "Tan 2,"  $15\frac{1}{2}$  yards, weighed 8.70 ounces; "Navy,"  $15\frac{1}{2}$  yards, weighed 9.66 ounces; and "Ognon,"  $16\frac{1}{2}$  yards, weighed 8.89 ounces. What were the weights officially reported for pieces similar, or claimed to be similar, to the last four pieces is not disclosed by the record as we have it. But, assuming that the customs officers weighed these same identical pieces of merchandise—although there is no proof that they did—and assuming that their weights for the six pieces differed from those of the city sealer, the importers have not shown by a *preponderance* of evidence that the weights officially ascertained were incorrect. The witness Trimble testified that the *actual* weight of the goods can not be reached unless entirely stripped; that is to say, unless the strings, coverings, pins, tags, braids, bolts, and other incidents of packing are removed. He further stated that such stripping of the goods did not improve them any, and that he thought that the customs officers had been so informed. The evidence does not show that the goods weighed by the city sealer were stripped, and even if they were, their weight, however exact it might be, would determine nothing more than the *approximate* weight of the rest of the consignment which had not been so stripped and weighed.

The appraiser did not cause the whole importation to be stripped and weighed. To do so would have been to work unnecessary hardship and loss on the importers. He probably stripped and weighed a percentage of the invoice just as probably did the city sealer, and on the basis of the weights so found calculated the weight of the rest of the goods which were similar in kind, quality, color, and width, thus arriving at a fair approximate weight. In our opinion such an approximation is entitled to the same consideration at least as that determined from the weights found by the city sealer. It follows, therefore, that mere difference between weights officially found and those ascertained by the importers or city sealer can not raise a presumption that the customs officers improperly weighed the goods or that the total weights

were less accurate than those found by the importers in substantially the same way. The weight of "Tan 2," 15½ yards, found by the city sealer, was 9.77 ounces, or 0.615 of an ounce per yard, while that of "Tan 2," 15¾ yards, was 8.70 ounces, or 0.57 of an ounce per yard. From this it would seem that there was an actual difference in weight, even in the same goods.

To support their contention that the methods used by customs officials in ascertaining weights and that the weights ascertained were unreliable, the importers introduced in evidence the report of the appraiser on the weights of another importation not in dispute here, but which is claimed to be merchandise similar to the goods under discussion. From that report it appears that 30 pieces of "Dresden 2," 60 pieces of "Sky," 60 pieces of "Pink," 30 pieces of "Dresden 1," and 60 pieces of "Champagne 1," invoiced as weighing 7¼ pounds 15½ ounces, weighed, as found by the appraiser, 72 pounds 10.19 ounces. As to this importation, Mr. Trimble testified that he personally stripped the same goods by taking the pins and braids out and the tags and ribbons off, and that the goods actually weighed 76 pounds *net*. This evidence is confirmatory of what we have already stated. Moreover, from that actual test to find true net weight it would seem that the invoice weights for which the importers contend may not be correct, and that the method of weighing the goods by the customs officers is not unfair to the importers, inasmuch as the weights found by them in that case were less than the weights set out in the invoice and less than the actual weight found by the importers on reweighing.

In the absence of material and competent evidence to the contrary, the method of ascertaining the weights of any importation and the weights officially reported by the customs officers are presumed to be correct. The fact that those weights differ from the invoice weights of the actual importation and from official weights found for anterior importations not involved in the protests, in our opinion, does not of and by itself overcome that presumption. To justify us in setting aside the official weights it was incumbent on the importers to show clearly and affirmatively that the customs officials did not weigh a fair percentage of the goods, or that the percentage weighed was not properly stripped, or that the weight of that percentage, properly stripped before weighing, was not correctly reported, or that the method of selecting, stripping, and weighing the goods was inadequate to secure a result at least approximately correct. This the importers have failed to do, and the decision of the Board of General Appraisers is therefore *reversed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

SONNEBORN SONS v. UNITED STATES (No. 239).<sup>1</sup>

## 1. PROVISIO IN PARAGRAPH 626, TARIFF ACT OF 1897—PARAFFIN.

In the interpretation of a statute, whenever possible, effect will be given to all parts of the act, even though to do this enlarges or limits the stricter meaning of some provision in the act, and though paraffin is free of duty, according to one paragraph of the tariff act of 1897, paraffin oil produced from petroleum must be taken to have been included by intent in paragraph 626 of that act, the proviso to which makes crude petroleum or its products subject to a countervailing duty and to be dutiable under said paragraph 626.

## 2. "COUNTRY," MEANING IN A REVENUE LAW.

The word "country," as employed in the revenue laws of the United States, embraces and applies to all the territorial possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control.

## 3. HAMBURG FREE ZONE.

The free zone in Hamburg is in the German Customs Union; it is not a "country" in the sense that term is employed in the proviso to paragraph 626, tariff act of 1897, and in the matter of customs duties it is to be regarded as a part of the German Empire.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7013 (T. D. 30569).

[Affirmed.]

*Walter Evans Hampton* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*William K. Payne* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion the court:

L. Sonneborn Son (Inc.) made an importation at the port of New York of paraffin manufactured in and exported from the free zone in Hamburg, Germany. It was made from crude petroleum produced in Russia. The collector of customs assessed duty upon the importation under the proviso to paragraph 626 of the tariff act of 1897 at the rate of 1 ruble 80 copecks per pood, that being the rate of duty levied by Russia upon similar merchandise imported therein from the United States.

The appellant here, protestant below, among other claims, alleged that the merchandise was entitled to free entry under paragraph 633 of the tariff act of 1897 as "paraffin," and, further, that it was not subject to the reciprocal or retaliatory provisions of the proviso to paragraph 626 of that act, in that it was produced in the free zone in Hamburg, Germany, wherein no duties were levied upon similar merchandise imported from the United States.

<sup>1</sup> Reported in T. D. 31504 (20 Treas. Dec., 735).

The relevant provisions of and proviso to paragraph 626 are as follows:

626. Oils: \* \* \*; petroleum, crude or refined: *Provided*, That if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country.

Paragraph 633 of the free list is as follows:

633. Paraffin.

The Board of General Appraisers found that the imported merchandise invoiced and returned by the appraiser as "paraffin oil" was paraffin, and held that having been manufactured of crude petroleum and exported from the free zone in Hamburg it was subject to the proviso to paragraph 626 and dutiable at the rate of 10 marks per 100 kilos, that being the rate of duty levied by Germany upon similar merchandise imported therein from the United States. In the briefs and at the hearing it was conceded by all parties that if any rate of duty were applicable it was as decided by the board, and that the decision of the collector must, in any event, be accordingly modified. That question is, therefore, not before this court for determination. It was settled, and we think rightly, by the United States Circuit Court of Appeals for the Second District in *United States v. Schoellkopf* and *United States v. Downing*. (146 Fed. Rep., 56.)

It is insisted, however, by the appellant that the proviso to paragraph 626, quoted *supra*, should be confined in its application to the purview of that paragraph and did not extend to any other paragraphs of the tariff act of 1897, and particularly did not extend to modify, repeal, or in any wise affect paragraph 633, quoted *supra*. This point likewise received consideration in the *Schoellkopf* case, and the contrary held by a majority of the court. Mr. Justice Coxe, however, dissented from the opinion of the majority of the court, and the appellant here has renewed the point with much vigor and ability.

While it is the general rule of law, familiar to all lawyers, that a proviso shall be confined in its application to the purview of the paragraph of which it is a part, it is equally well settled that that rule is not controlling, and that effect must be given to the intent of Congress as manifested by a consideration of the whole act and all of its parts. Provisos are equally subject to the elementary principle of statutory construction that whenever possible effect must be given to all parts of an act, and this rule is of such imperative force that to accomplish that purpose the courts have uniformly held that to effect such every part of a law should yield a part of its plain import where by so doing effect can be given to other parts of the statute. (Lewis's *Sutherland Statutory Construction*, sec. 368, *et seq.*, and 352, *et seq.*, and authorities cited.)



The proviso to paragraph 626 bears such internal evidence of the intent of the Congress to extend its scope and effect beyond the purview of that paragraph that we think that construction must be adopted.

The kindred subjects of the proviso and paragraph are "oils," \* \* \* "petroleum, crude or refined."

In the first view, this merchandise was described as an oil. It is a paraffin oil. It is a paraffin oil produced from crude petroleum, and, therefore, one of the products of petroleum. Confining the proviso to the purview of the paragraph itself, we have in effect provided, without any advertence to paragraph 633, that where oils, of which paraffin oil is a class, when the product of petroleum, which is this merchandise, are the subject of duty by any country when exported from the United States, they shall be the subject of an equivalent duty when exported from such country to the United States. Reading this provision in conjunction with paragraph 633 there is no conflict. Assuming paraffin oil paraffin, it is tantamount to a provision that paraffin oil shall be entitled to free entry, but when paraffin oil produced from petroleum is exported from a country levying duty upon the same merchandise when imported from the United States, it shall when imported from such country to the United States be subjected to the prescribed duty.

In another view, leading to the same conclusion, the purview of the paragraph is confined to petroleum *crude or refined*. The proviso extends to petroleum and *all the products of crude petroleum*. It appears from the record and various sources of judicial knowledge that there are many products of crude petroleum which are not petroleum refined. There is no escape from the conclusion that by the proviso the Congress had in mind products other than those enumerated in the purview of the paragraph. It further, likewise, appears that while paraffin is sometimes a product of petroleum it is not always such, and there are several classes of paraffin which are not the product of petroleum. In this light the intention of Congress, the necessary office of each paragraph, and the absence of conflict between them are apparent. The Congress provided that paraffin should be admitted free of duty. In the interests of reciprocity or retaliation, whichever spirit may have moved the enactment, it provided reciprocal or retaliatory duties upon crude petroleum, petroleum refined, and all other products of such, whether they should be refined petroleum or paraffin, when produced from petroleum, or what else. The very language of the proviso compasses a large variety of articles not included in the purview of the paragraph which is indisputable evidence of the intent of Congress to so extend its application.

This construction gives application to both the provisions exactly as the plain intent of Congress is manifested by considering all the pro-

visions of the act. That was the view taken by a majority of the court in the Schoellkopf case, and we think it sound.

In *Arthur v. Lahey* (96 U. S., 112) and *American Net & Twine Co. v. Worthington* (141 U. S., 468) and other cases cited and commented upon by counsel for appellants in their brief, the contending paragraphs were in effect repealing provisions, the very import of which, therefore, denied the possibility of their being read together and effect being given to each. They are for that reason not applicable.

The next contention of appellants, and one which was not tendered in the Schoellkopf case, but is here for the first time, is that because duties are not imposed upon paraffin in the free zone in Hamburg upon like merchandise imported from the United States that Hamburg is the *country* of exportation within the proviso to paragraph 626, and hence the retaliatory or reciprocal duties should not be imposed upon such merchandise imported from the free zone therein to the United States.

What constitutes a country in customs nomenclature has been the subject of decision by the Supreme Court. In *Stairs v. Peaslee* (18 How., 59 U. S., 521, 526) the court said:

\* \* \* *The word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control.* The question was brought before the Treasury Department in 1817, and, on the 29th of September in that year, instructions were issued by the department, in a circular addressed to the different collectors, in which the construction above stated is given the word. The practice of the Government has ever since conformed to this construction, and it must be presumed that Congress, in its subsequent legislation on the subject, used the word according to its known and established interpretation.

Apart, however, from this consideration, we regard the construction of the Treasury Department as the true one. *Congress certainly could not have intended to refer to mere localities or geographical divisions without regard to the State or nation to which they belonged.* \* \* \* And, moreover, if the construction contended for by the plaintiff could be maintained it would soon be found that goods would not generally be exported directly to the United States from the principal market where they were procured, but sent to some other place, where they were not in demand, to be shipped to this country; \* \* \* neither the words of any revenue law nor any policy of the Government would justify a construction alike injurious to the public and to the fair and honest importer.

It is contended, however, by the appellants that the general power of legislation and administration by the German central government did not extend to customs matters, and therefore this case is not within the scope of this decision, and that the power of general legislation only over a State did not deprive it of its character as a country for customs purposes.

The so-called "free zone" in Hamburg is but a part of the *State* of Hamburg. The State of Hamburg is one of the States of the German Empire. It possesses a legislative government and administrative

powers for certain purposes, even including subordinate customs revenue administration. The German Empire in its entirety represents a gradual evolution of several States or sovereignties from an independent existence into a central government. This result had its earliest inception in the Zollverein. In this all the States composing the union were sovereign and independent. Each State levied and administered its own customs and revenues. The next step in the course of federal consolidation or union, and it may be particularly noted in connection with the claims here made, was the customs union treaty of July 8, 1867. This particularly brought in closer connection the North German Bund, so-called, and German States lying beyond the line of the Main. The motto which was the fundamental idea of the customs union treaty of 1867 was "Germany forms one territory in matters of tariff and of trade, surrounded by common boundaries." It was in effect a union of all the contracting parties, many of which had previously by separate treaties effected the common purposes of the treaty of 1867. The motto of the customs union treaty of 1867 subsequently became that of the imperial constitution, which by its terms became an imperial law on the 16th of April, 1871. It recites:

ARTICLE 1. The territory of the bund shall consist of the States of \* \* \* and Hamburg.

ART. 4. The following matters shall be under the supervision of the Empire and subject to the legislation of the same \* \* \*:

(2) Legislation with respect to the tariff, commerce, and those taxes to be applied for imperial purposes; \* \* \*.

ART. 34. The Hanse cities, Bremen and Hamburg, together with a part of their own or of the surrounding territory suitable for such purpose, shall remain free ports outside the common tariff borders, until such time as they shall request admission into the same.

ART. 35. The Empire has the exclusive right of legislation as to all tariff matters; \* \* \*.

ART. 36. The collection and administration of the customs duties \* \* \* is left to each State, within its own territory, so far as these functions have heretofore been exercised by each State.

The Kaiser supervises the observance of the legal conduct of affairs, by means of imperial officials, whom he appoints, with the consent of the committee of the Bundesrat on customs duties and taxes, to act in conjunction with the officials and directive boards of the several States.

\* \* \* \* \*  
ART. 38. The revenues from the customs and from the other taxes mentioned in article 35, so far as these latter are subject to imperial legislation, flow into the treasury of the Empire \* \* \*.

By the provisions of the imperial constitution, therefore, the treaties between the several States in the Zollverein and the provisions of the customs union treaty of 1867 were merged in the imperial constitution, except as noted. The general power of tariff and customs legislation was vested in the Imperial Government through the Bundesrath and the Reichstag. The immediate collection of the customs and the

administration of the customs laws, where not otherwise provided for by imperial legislation, were conducted by State officials, but under the supervision of imperial officers appointed by the Crown and the funds paid into the imperial treasury.

The pertinent exception was the State of Hamburg, which reserved unto itself the right to remain a free port until it should otherwise consent and make proclamation of such fact.

On September 19, 1888, having previously consented to enter the imperial union for customs purposes, with the exception of a portion of its territory, such action was taken and results followed as shown by the following notice:

SEPTEMBER 19, 1888.

*Announcement of Hamburg's union with the customs district of Germany.*

The senate publishes the following for public notice:

The federal council has ordered, upon the proposal of the Hanse-town Hamburg, that the territory of Hamburg, with the exception of the remaining free-port district and the harbor at Cuxhaven, be annexed to the customs district.

The chancellor, in accordance with the authority vested in him by the federal council, has directed that this union go into effect on October 15.

The customs boundary of the remaining free-port district of Hamburg has the following course:

[Here follows description subsequently, but in a way not material to this argument, changed.]

The customs boundary around the harbor at Cuxhaven remains unchanged.

From the day of the customs union all the laws which apply to the German customs district with reference to the administration of the tariffs and imperial taxes, as well as the regulations already promulgated for those sections of Hamburg which previously belonged to the German customs union, in so far as they were not in force before in the part which is to be included, shall be in force and effect in the annexed district.

Done at the meeting of the Senate, Hamburg, September 19, 1888.

The State of Hamburg thus became a part of the German customs union and ceded all of that sovereignty to the Federal Empire or union, with the exception of the designated district within the territory of Hamburg.

Doubt having arisen as to the customs status of the River Elbe from Hamburg to its mouth in December, 1881, the Bundesrath included the River Elbe, together with the islands therein, in the common tariff district, with a provision freeing the ships to and from Hamburg from any action upon the part of the customs officials.

The free zone in Hamburg, it is thus seen, constitutes but a part of the territory of the State of Hamburg. The area which, as described in the record, of approximately 10 square miles is largely covered by warehouses and manufactories. It is not a separate sovereignty or municipality and has no separate municipal or sovereign existence. It is a part of the State of Hamburg, which possesses certain state powers and attributes of sovereignty. It has no political lines of demarcation.

Its separate existence is purely geographical. The State of Hamburg, of which it is a part, as such, has surrendered in pursuance of the terms of the imperial constitution all rights of customs legislation to the Federal Empire. Its administration of the customs laws is under the supervision and direction of the Federal Government, and the funds collected therefrom paid into the federal treasury. The State of Hamburg, as such, has surrendered the power of customs legislation to the Federal Empire, which has provided that paraffin imported from the United States shall pay a duty of 10 marks per 100 kilos, which law is in force within all parts of the State of Hamburg except in the free zone, and duties are collected by the officers of the State of Hamburg under the supervision of the federal officials upon all importations of petroleum or its products from the United States thereto.

So far, therefore, as the State of Hamburg, as such, is concerned, there is levied therein the duty stated upon crude petroleum and its products when imported from the United States.

Counsel for the appellants insists that, as the spirit of the provisions of paragraph 626 are in the nature of reciprocity and no duties are collected within the free zone in Hamburg, that spirit of reciprocity requires that no duties should be collected upon paraffin when imported at any place in the United States from the free zone in Hamburg. We do not think the conclusion follows from the premises. The equivalent proposition would be, confining the argument to Hamburg alone, conceding it the sovereignty to which these considerations should be confined, that if Hamburg opens but a single port or part of its territory to importations from the United States and closes the remainder the equivalent would be for the United States to open but one of its ports or parts to goods imported from Hamburg and close the remainder.

But we do not think there is the slightest tenable ground supporting the contention that Hamburg is a "country" within the language of the customs revenue laws. It is plainly, and particularly for customs purposes, a part of Germany, and Germany is the "country" within the proviso of paragraph 626 and customs law.

The testimony shows that the free zone in Hamburg is nothing more or less than an aggregation of warehouses and manufactories. The situation, though more extensive, is identical with the manufacturing warehouses operated under the law in this country. That limited territory, the free zone, which is occupied almost exclusively by warehouses and factories, affording but a fractional, if any, consumers' market for this merchandise, is surrounded by a series of German customhouses, and whenever any paraffin is taken from the free zone into any other part of Hamburg or introduced into the commerce of Germany the stated duty is collected.

The advantages enjoyed by the United States as afforded by the free zone in Hamburg are in no considerable degree greater or other than those afforded Hamburg and the whole Empire of Germany by the law authorizing the establishment of manufacturing warehouses in this country, the shipment of merchandise thereto, its manufacture therein and exportation therefrom from every country of the world free of duty. Any spirit of reciprocity, if such is afforded in this case, therefore, is satisfied by equivalent conditions afforded in this country to those afforded this country by Hamburg or Germany in the free zone in Hamburg.

We are of the opinion that the law was correctly interpreted by the Board of General Appraisers in its very able opinion and should be *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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UNITED STATES *v.* UNITED CIGAR STORES Co. (No. 266).<sup>1</sup>

PHILIPPINE CIGARS TRANSSHIPPED AT HONGKONG, A DIRECT SHIPMENT.

In the enactment of the provisions of the tariff act of 1909 that relate to commerce between the United States proper and the Philippine Islands, the Congress will be presumed to have had in mind the actual requirements of trade in the Philippines, as these may call for transshipment of merchandise; and having in view, too, the recognized benevolent intent of legislation affecting the archipelago, that shipment must be deemed a direct shipment from the Philippines to the United States when the consignment was forwarded on a through bill of lading from Manila to New York, but by reason of a trade requirement was transshipped at Hongkong; and so the goods fell within section 5, tariff act of 1909, making them free of duty.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7026 (T. D. 30643).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

*Max J. Kohler*, *Sol M. Stroock*, and *Henry L. Moses* for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

A verified consular invoice dated Manila, P. I., June 25, 1909, shows that the United Cigar Stores Co., a corporation organized under the laws of New Jersey, purchased at Manila from the Philippine Co. (Ltd.), at a cost of \$3,387.25, inclusive of packing and other charges, 225,000 cigars manufactured from tobacco the growth and product of the Philippine Islands. It appears from the bill of lading in evidence

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<sup>1</sup> Reported in T. D. 3155 (20 Treas. Dec., 742).

that the cigars so purchased were delivered at Manila on June 25, 1909, to the Pacific Mail Steamship Co. for carriage from that place to New York, shipment thereof to be by the steamship *Korea* to San Francisco and thence to destination by transshipment. As the *Korea* had left Manila on June 19, 1909, and was lying at Hongkong at the time the bill of lading was executed, the Pacific Mail Steamship Co. placed the cigars on board the *Yuensang* and caused them to be transported by that vessel to Hongkong, where by lighters they were immediately transferred without landing to the *Korea*. The *Korea* carried the goods to San Francisco, whence, under entry for immediate transportation in bond, they were forwarded by rail to New York. At New York the cigars were entered for immediate consumption, and the collector, after liquidating the entry as "free," delivered the goods to the importer, who sold them for \$9,500. Subsequent to the sale by the importer the collector of customs, believing that the transboarding of the cigars at Hongkong interrupted their "direct shipment" from Manila to the United States and that they were therefore not entitled to free entry, ordered a reliquidation, and imposed on the merchandise duties amounting in the aggregate to some \$19,000, under the provisions of paragraph 224 of the tariff act of August 5, 1909, which reads as follows:

224. Cigars, cigarettes, cheroots of all kinds, four dollars and fifty cents per pound and twenty-five per centum ad valorem, and paper cigars and cigarettes, including wrappers, shall be subject to the same duties as are herein imposed upon cigars.

The importers protested against the reliquidation and the duties imposed and claimed that the cigars were entitled to free entry under the provisions of section 5 of the act, the relevant parts of which are as follows:

SEC. 5. That there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided*, That \* \* \* all articles the growth or product of or manufactured in the Philippine Islands from materials the growth or product of the Philippine Islands or of the United States, or of both, \* \* \* coming into the United States from the Philippine Islands shall hereafter be admitted free of duty, except \* \* \* cigars in excess of one hundred and fifty million cigars, which quantities shall be ascertained by the Secretary of the Treasury under such rules and regulations as he shall prescribe. \* \* \* *And provided further*, That the free admission, herein provided, of such articles, the growth, product, or manufacture of the United States, into the Philippine Islands, or of the growth, product, or manufacture, as hereinbefore defined, of the Philippine Islands into the United States, shall be conditioned upon the direct shipment thereof from the country of origin to the country of destination: *Provided*, That direct shipment shall include shipments in bond through foreign territory contiguous to the United States.

The Board of General Appraisers sustained the protest and the Government appealed.

It seems to be conceded that the cigars were manufactured from tobacco the growth and product of the Philippine Islands within the meaning of the statute; that the limit of 150,000,000 cigars entitled to exemption from duty in any one fiscal year was not exceeded by the importation; and that shipment from origin to destination was accomplished as hereinbefore recited. There being no dispute as to the facts of the case, the question to be determined on appeal is purely one of law, namely, What construction shall be put upon the provision for "direct shipment," which is expressly made a condition for the admission free of goods coming from the Philippines to the United States?

The Government insists that no dutiable merchandise imported from the Philippines is entitled to free entry unless transported therefrom to the United States in a *single bottom* and that once such merchandise has passed beyond the maritime jurisdiction of the islands any transfer of it from one vessel to another is violative of the statutory condition and precludes its admission without payment of the usual duties. On the other hand, the importers claim that goods the product, growth, and manufacture of the Philippines are exempt from duty if their shipment is made on a through bill of lading and if as a matter of fact they come to the United States without entering into the commerce of any other country.

The language of the statutory provision is fairly susceptible of either interpretation, and it is therefore not only permissible but necessary to consider the history of the legislation and to inquire into the conditions and the circumstances inducing its enactment in order to arrive at a satisfactory conclusion touching its true purpose and intention.

The United States acquired the Philippines by cession from the Kingdom of Spain, and their acquisition was in a measure one of the unavoidable results of the Spanish-American War. The treaty between the high-contracting parties did not vest the peoples of the islands with the rights and privileges of American citizenship, and that of course left their future well-being largely dependent on whether they should be considered as utter strangers to the American household or as wards of the Nation for whose happiness and prosperity the Government was at least morally responsible. The original instructions of the President to the Philippine Commission and the organic act for the government of the islands argue strongly that the political welfare and material progress of the Filipino people were matters of real and serious concern to the American Government. Indeed, both act and instructions indicate that from the outset the United States regarded the inhabitants of its newly acquired territory as something more than mere aliens, and that in dealing with them it elected to pursue a policy which was highly altruistic and benevolent.



The establishment of civil government in the islands, the concession of a large measure of political autonomy to the peoples thereof, and the beneficent intent of legislation affecting their business interests, are all convincing evidences that a kindly purpose rather than a selfish one was to distinguish our sovereign relations with the Philippines. In this spirit was passed the act of March 8, 1902, which admitted to the United States articles the growth and product of the Philippine Islands at 75 per cent of the duty imposed on foreign imports of the same character and which directed that all the duties collected thereon be covered into the Philippine treasury. That act was intended to stimulate the business of the islands and to provide revenue for their government. Unfortunately, time and experience proved that it was not effective for either purpose, and that fact, as shown by public documents having been officially called to the attention of Congress, brought about the enactment of section 5 of the tariff act of August 5, 1909, the construction of which constitutes the present subject of dispute. That section was designed to establish a large measure of free trade between the United States and its oriental dependencies, and one of its principal objects, if not its controlling motive, was to provide a free market in the United States for all products the growth and manufacture of the Philippine Islands except rice and sugar and tobacco in excess of the maximum quantities specified.

For effective customs administration it was of course necessary to surround such a commercial concession with safeguards which would practically preclude a substitution of goods and reasonably secure the revenue of both countries against fraud or evasion. Accordingly admission free into either country of articles the growth or product or the growth, product, and manufacture of the other was conditioned upon their "direct shipment" from the country of origin to the country of destination. The term "direct shipment," considered by itself, is open, however, to several interpretations. It may mean that the goods must be carried from the Philippines to the United States or vice versa in a *single vessel* proceeding by the most direct route without stopping at way ports, or it may mean shipment *in a single vessel* following its usual and customary course, or it may mean that the goods must be originally destined for the United States or the Philippines, and that without mingling with the commerce of any other place they must come as directly from the country of origin to the country of destination as commercial limitations may permit. Which of these meanings should prevail as truly expressive of the legislative will depends on which of them best gives effect to the general policy of the Government and the main purpose of the law, and at the same time preserves the full intention of the condition. As it can not be assumed that the statute contemplated the infliction of a condition with which it was commercially impracticable to comply, the feasibility of the

condition under one meaning or another naturally becomes a subject of inquiry, and that in its turn necessarily involves a consideration of the actual commercial method of carrying goods between the United States and the Philippines which confronted the lawmakers when the tariff act of 1909 was passed.

It is a matter of history that when Spain and Portugal shared the Indies between them Manila was the dominant and most important port in the Orient. In time, however, Great Britain gained a foothold in the Far East, the Suez Canal was constructed, new avenues for commerce were opened up, and Spain lost her trade ascendancy. In consequence Hongkong became a shipping terminal and ultimately the port of final destination for nearly all deep-water craft trading with the Orient. As a result Manila ceased to be a shipping center, Philippine goods had to be carried in British bottoms, and the trade of the islands with the outside world was forced through Hongkong, to which all minor ports of adjacent territory were made tributary by the diversion to that port of shipping facilities. In the very same year in which the act was passed the evidence discloses that for the six months ending December 31 vessels of the Pacific Mail Steamship Co. and of the Toyo Kisen Kaisha made 25 trips from Hongkong to the United States, and during the same period only 7 trips from the Philippines to the same destination. In their time-tables these companies expressly direct attention to the fact that their vessels call at Manila only about once a month and that those not able to take advantage of the monthly trips should avail themselves of "*half a dozen lines of steamers*" the vessels of which make trips between Hongkong and Manila every two or three days. From this alone it is apparent that vessels plying between the Orient and the United States favor Hongkong as a shipping point and that only occasional trips are made to Manila. Shipping out of the Philippines by way of Hongkong was obliged by trade requirements, and of this fact Congress can not be assumed to have been ignorant, taking into account that shipping between the islands and the United States had been a subject of legislative investigation and consideration for more than seven years. (Act of March 8, 1902; act of April 15, 1904; act of April 30, 1906; act of April 29, 1908; Congressional Record of March 23, 1909.)

In the light of these facts, holding in view the settled policy governing our relations to the Philippines, considering the beneficent trend of all congressional legislation affecting them, and bearing in mind that transshipment at Hongkong of Philippine goods destined for the United States was a trade necessity, we think we would not be warranted in giving to the condition the interpretation contended for by the Government. To do so would be to hold that Congress intended to impose a condition which for lack of adequate shipping conveniences was commercially impracticable and therefore in effect frustrative of

the primary and principal purpose of the law. Our opinion in this behalf is confirmed by the attitude of the courts as to transshipment and the effect thereof on importations and their directness. For a long time judicial tribunals have appreciated that the exigencies of transportation frequently require that goods exported from other countries and destined for the United States shall be transshipped en route. In consequence the courts have held almost uniformly that such transshipment does not change the status of the goods as an importation from the country of original shipment if they have not mingled with the commerce of any other country and if the official invoices and bills of lading evidence that the United States was at the time of exportation intended to be their final destination. *Millar v. Millar* (17 Fed. Cas., 9546); *Grant v. Peaslee* (9 Fed. Cas., 1143). More than that, it has been judicially determined that notwithstanding such transshipment *the transportation of the merchandise from the port of original shipment to the United States and the voyage from the country of origin to the country of destination must be regarded as continuous*. *Griswold v. Maxwell* (11 Fed. Cas., 5838).

Again, in the case of reciprocal commercial agreements between the United States and foreign countries, it is the rule that goods are not entitled to the benefit of such agreements unless they be the products of the treaty nation and are *directly imported from it*. Nevertheless, it seems to be settled doctrine that if goods are originally shipped and destined for the United States and such fact is evidenced by consular invoices and through bills of lading a transshipment of them en route not amounting to a commingling of the goods with the commerce of the country of transshipment does not alter their status as a *direct importation* from the country of origin. The necessity for transshipment of goods, and that such transshipment should not be considered as an interruption of their direct importation, was recognized by the Treasury Department as early as May 27, 1899 (T. D. 21186), and has been scrupulously followed ever since, by the Board of General Appraisers. *In re Montagne & Son* (T. D. 21565, Aug. 31, 1899); *In re Hermann Brothers* (T. D. 22447, Aug. 15, 1900); *In re The Florida Brewing Co.* (T. D. 23473-a, Jan. 21, 1902); *In re Morello* (T. D. 24971, Feb. 2, 1904); *In re Leerburger Brothers* (T. D. 25510, July 28, 1904).

If merchandise from a foreign country shown by consular invoices and through bills of lading to be destined for the United States may be transshipped without losing its character as *an importation from the country of original shipment*; if under reciprocity treaties with foreign countries goods may be admitted as *directly imported from the place of origin*, although they have been transshipped in other countries, it would seem that there could be no sound reason for refusing the same consideration to goods from an American possession invoiced

on through bills of lading for the United States and merely transshipped en route. To hold that Philippine products so transshipped are not directly imported from the islands, or that their transshipment, compelled by the laws of trade, constitutes a breach of the condition for their direct shipment, would be, in effect, to hold that Congress contemplated that commercial relations between the United States and its oriental possessions, for the well-being of which it stands pledged, should be hampered by conditions not exacted from foreign countries for the welfare and business prosperity of which the nation is in no way responsible. Such a holding we are not prepared to make in the absence of language which would leave us no other alternative. That the term "direct shipment" was not designed to restrict carriage to one vessel, but to insure that the goods imported into the United States should be the identical goods exported from the Philippine Islands is evidenced to some extent by the language used in the proviso relating to articles unpacked while en route by accident, wreck, or other casualty, or so damaged as to necessitate their repacking. This proviso declares that such articles—

shall be admitted free of duty upon satisfactory proof that the unpacking occurred through accident or necessity *and that the merchandise involved is the identical merchandise originally shipped from the United States or the Philippine Islands, as the case may be, and that its condition has not been changed, except for such damage as may have been sustained.*

"Direct shipment" means no more than "directly imported," and if Philippine products invoiced for the United States on a through bill of lading have been so transshipped as not to permit of their commingling en route with the commerce of any other country, the condition for direct shipment has been fulfilled according to the purpose and meaning of the statute. That the condition was based on "direct shipment" rather than on "a through bill of lading" was, in all probability, due to the fact that the former was a broad term while the latter was limited and would not cover the case of importations carried in vessels owned or chartered by the importers and which therefore had no technical bills of lading.

The fact that the law provides that "direct shipment" shall include shipments in bond through foreign territory contiguous to the United States shows no more than that the legislature was not forgetful of trade contingencies and that it was mindful of making provision for the free admission of the goods even if they should pass to the control of a carrier in contiguous territory who might not be bound by the original contract of lading.

The rule that the unnecessary transfer of a cargo insured by a particular vessel from that vessel to another avoids the policy of insurance has no application here. In such cases the insurer selects his risk by the terms of his contract of insurance and very properly

no other risk can be substituted for it without his consent unless necessity compels a substitution beneficial to him as well as to the insured.

The decision of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

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UNITED STATES v. BEIERLE (No. 269).<sup>1</sup>

BARETTES OF BASE METAL SET WITH IMITATION JET, NOT JEWELRY.

On a review of the interpretations, both legislative and judicial, there being an absence of any evidence going to show a commercial designation of the commodity and the fact appearing that the relevant clause in the tariff act of 1909 was placed there after a like clause in the tariff act of 1897 had received an authoritative interpretation, similar to the one here now given, barettes made of base metal and set with imitation jet are not dutiable as "jewelry," but are dutiable as manufactures of paste under paragraph 109, tariff act of 1909.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7019 (T. D. 30612).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (Charles Duane Baker on the brief), for the United States.

Comstock & Washburn (Albert H. Washburn of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal as it reaches this court involves the dutiable classification under the tariff law of 1909 of barettes, composed of base metal set with imitation jet.

When the case was before the board there were three classes of merchandise involved.

First, hat pins having tops set with imitation precious stones and composed of glass or paste *other than imitation jet*.

These were assessed by the collector as glass, cut, at 60 per cent ad valorem. The board held that they were properly dutiable at 45 per cent ad valorem under the appropriate provision of the tariff law on authority of United States v. New York Merchandise Co. (167 Fed. Rep., 684). The appeal of the Government as to this class of merchandise was expressly abandoned in the briefs and at the hearing.

The third class was hat pins having tops set with imitation of precious stones composed of glass or paste *other than imitation jet*, the same being articles of jewelry or personal adornment costing more than 20 cents per dozen pieces, and were held by the board to be

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<sup>1</sup> Reported in T. D. 31506 (20 Treas. Dec., 749).

dutiable at the specific rates, varying according to the value, and 25 per cent ad valorem under paragraph 448. There was no appeal from the decision of the board as to this class of merchandise.

The question here is the dutiable classification of the barettes.

The Government contends that they are properly dutiable as "articles commonly or commercially known as jewelry," under the provisions of the last part of paragraph 448 of the tariff act of 1909, which reads as follows:

448. \* \* \* all articles *commonly or commercially known as jewelry, or parts thereof, finished or unfinished, including chain, mesh, and mesh bags and purses*" (,) "*composed of gold or platinum, whether set or not set with diamonds, pearls, cameos, coral, or other precious or semiprecious stones, or imitations thereof, sixty per centum ad valorem.*

It is maintained by the importers, and it was held by the board, that such merchandise is not properly dutiable under the provisions of this paragraph, but as manufactures of paste under paragraph 109 of said act. The board made no finding as to whether or not the articles were commonly or commercially known as jewelry, but based their decision upon the proposition that, reading the paragraph from all four corners without regard to punctuation, and considering the same in conjunction with paragraphs of the law *in pari materia*, it was the manifest purpose of the Congress to have enacted as though there were a comma after the word "purses," and that in consequence the whole paragraph was by the words "composed of gold or platinum" confined to merchandise of that composition. As this importation was not composed of gold or platinum it would by that construction be excluded from the paragraph.

The Government in its brief makes the assertion that it is conceded on all hands that the articles in question, barettes, are known "commercially as jewelry." The appellee refused to join in this concession, and the board made no finding of fact upon that point. There was no evidence introduced at the hearing before the board by either appellant or the appellees.

Without expressing an opinion upon the point upon which the board based its decision, we think that the point made by appellees before this court that the history of legislation upon the subject and the uniform interpretation given similar provisions in previous tariff acts in the presence of this legislation is, in its results, conclusive of the case.

The uniform course of legislation and judicial interpretation from and including the tariff act of 1846 to date indicates that both the Congress and the courts have regarded articles made of imitation jet and base metal as something, for tariff purposes at least, different from jewelry, and have not deemed them included within the term jewelry as used in the customs revenue laws. When, therefore, the Congress in paragraph 448 legislated with reference to jewelry and

articles commonly and commercially known as jewelry they used those terms in the same sense indicated by the course of legislation of years previous, *and in accordance with the judicial interpretation thereof last previously promulgated.*

What then was this course of legislation and decision at the time of the enactment of the tariff act of 1909?

The tariff act of July 30, 1846 (9 Stat., ch. 74, p. 45), provided:

SCHEDULE C. \* \* \* jewelry, real or imitation; jet and manufactures of jet and imitation thereof; \* \* \*

In the tariff act of March 2, 1861 (12 Stat., ch. 68, sec. 22), it was enacted:

SEC. 22. \* \* \* Jet, and manufactures of jet, and imitations thereof; \* \* \*

By section 21 provision was made in this wise:

SEC. 21. \* \* \* diamonds, \* \* \* and other precious stones, when not set, a duty of five per centum ad valorem \* \* \* ; when set in gold, silver or other metal, or on imitations thereof, and all other jewelry, twenty-five per centum ad valorem. \* \* \*

The tariff act of July 14, 1862 (12 Stat., ch. 163, sec. 13), used this language:

SEC. 13. \* \* \* Jet, and manufactures of jet, and imitations thereof; \* \* \*

This provision increased the duties levied upon jet and manufactures of jet and imitations thereof, as previously provided in the tariff act of 1861, and left the duty upon jewelry the same as previously provided. Here is the clearest manifestation of the intention of Congress to deal with the articles as separate and distinct commodities in the tariff sense.

And, later, when the provisions in force were codified in the Revised Statutes of the United States, they read as section 2504, as follows:

SCHEDULE M. Jet, manufactures and imitations of: \* \* \*

SCHEDULE M. Precious stones and jewelry. \* \* \*

Thus seems to have continued the statutory description through the many changes of the tariff law down to the tariff act of March 3, 1883 (22 Stat., ch. 121). It was therein provided, as follows:

SCHEDULE N. \* \* \* Jet, manufactures and imitations of. \* \* \*

SCHEDULE N. \* \* \* Jewelry of all kinds. \* \* \*

It clearly appears by these provisions that from 1846 down to 1890, the date of the tariff act following that of 1883, a period of 44 years, that Congress maintained in plain and unmistakable terms that it contemplated for dutiable purposes jet and imitation jet, and jet and imitation jet articles as separate and distinct tariff subjects from jewelry.

The tariff act of 1890 by paragraph 452 provided:

452. Jewelry: All articles, not elsewhere specially provided for in this act composed of precious metals or imitations thereof, whether set with coral, jet, or pearls, or with diamonds, rubies, cameos, or other precious stones, or imitations thereof, or otherwise, *and which shall be known commercially as "jewelry,"* and cameos in frames, fifty per centum ad valorem.

And in paragraph 459 of that act it was provided:

459. Manufactures of \* \* \* jet, paste, \* \* \* or of which these substances \* \* \* is the component material of chief value, not specially provided for in this act. \* \* \*

By paragraph 452 of this act only those articles composed of jet or imitations thereof are classified under the title jewelry, "which shall be known commercially as jewelry." The provision assumes that there are articles of jet, or articles made of imitation jet, which are not known commercially as jewelry. Ornaments of such not within the strict category of jewelry might well have come under that class.

The further provision for manufactures in chief value of jet, or imitation thereof, also indicates, when speaking of the included merchandise, there were articles of jet not known as jewelry. So it may be said of the tariff act of 1890 that while Congress expressly legislated for a class of imitation jet articles *which were known as jewelry*, it impliedly in that paragraph, and expressly in paragraph 459 of the act, recognized the existence of jet and imitation jet articles which were not known as jewelry.

In the tariff act of 1897 articles of jet or imitation jet, or even those commercially or commonly known as such, were not expressly included within the paragraph for jewelry. That paragraph was as follows:

434. Articles commonly known as jewelry, and parts thereof, finished or unfinished, not specially provided for in this act, including precious stones set, pearls set or strung, and cameos in frames, sixty per centum ad valorem.

Paragraph 115 of that act provided:

115. Manufactures of \* \* \* jet, \* \* \* not specially provided for in this act, fifty per centum ad valorem.

It was also provided as follows:

112. \* \* \* and all glass or manufactures of glass or paste, or of which glass or paste is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem.

A decision construing the several paragraphs of the tariff act of 1897 as to imitation jet articles was announced in *Bader v. United States* (116 Fed. Rep., 541), a decision of the Circuit Court for the Southern District of New York. The imitation jet there was referred to as black goods. The court said:

The court is unable, however, to find sufficient proof to sustain the finding of the board as to the so-called "black goods" which appear to be described in the paragraphs numbered 9 and 10 of the decision. The testimony as to these goods seems to be practically undisputed that they are not jewelry and were not commonly known as jewelry.

This decision was rendered in June, 1902.

Later, and in 1905, the Circuit Court of Appeals for the Second Circuit, having under consideration the same paragraph, in *United States v. Schiff* (139 Fed. Rep., 549), said:

We do not deem it important to attempt a comprehensive definition of the word "jewelry" or the phrase "articles commonly known as jewelry." The only relevant question now before the court is, were the articles in controversy, at the date of



importation, commonly known as jewelry? \* \* \* The question is one of fact and we see no reason to disturb the finding of the board; (the board found that they were not jewelry or commonly known as jewelry) \* \* \*. The merchandise in question consists of cheap flimsy ornaments in the form of \* \* \*, made wholly of base metal, or of *such metal set with imitation jet* or imitation precious stones made of glass and known as paste." \* \* \*

In May, 1906, G. A. 6374 (T. D. 27382), the board held in conformity with the Bader decision that ornaments composed of metal and paste in imitation of jet were not included within paragraph 434 of the tariff act of 1897 as jewelry or articles commonly known as jewelry, but were properly dutiable as manufactures of paste under paragraph 112 of that act.

This was the status of the legislative and judicial interpretation by the highest invoked authority and in the latest expressions of all competent authorities when the tariff act of 1909 and the provision before the court was enacted.

We think that it may be unqualifiedly said that from 1846 to the time of the enactment of the tariff law of 1909 all legislation upon the subject uniformly observed the distinction for tariff purposes between articles in imitation of jet and articles of jewelry, or commonly known as jewelry, as separate and distinct entities for dutiable purposes.

Paragraph 109 of the tariff act of 1909 provides for "manufactures of glass or paste or of which glass or paste is the component material of chief value."

That the dropping of the provision for imitation jet, in specific terms, in subsequent tariff acts did not indicate that Congress intended to do away with the well-established distinction between imitation jet articles and jewelry, but might indicate a purpose to continue that distinction, and to provide for them in some other more comprehensive provision of the tariff law is a well-established principle of interpretation in customs law. *Robertson v. Rosenthal* (132 U. S., 460); *Garrison Wright v. United States* (127 Fed. Rep., 1022).

That this results in a more uniform rate of duties upon goods of substantially the same material, quality, and use lends strength to the conclusion.

In view of this long and consistent line of legislation and judicial interpretation, and in the absence of any testimony whatsoever in this record going to show, or finding by the board, that the articles here under consideration, which are in chief value of imitation jet, were by the trade and commerce of the United States uniformly and commonly known as jewelry; and in view of the fact that the provision in the tariff act of 1909 was enacted when precisely the contrary interpretation had been placed upon the provision *in pari materia* of the act of 1897, and in substantially the same words, no other conclusion can be reached by this court.

In this view the other points raised in the case are of unnecessary determination.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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TILGE v. UNITED STATES (No. 274).<sup>1</sup>

1. REAPPRAISEMENT ACCORDING TO SO-CALLED CONSULAR SAMPLES.

Where the goods in controversy had gone into commerce and had been there consumed, in reappraisement proceedings, on a failure to produce the samples of these goods selected and deposited at the public stores, it is not permissible for the Government to substitute consular samples forwarded according to a practice of the Treasury Department from the place of export abroad.

2. SAMPLES ON REAPPRAISEMENT.

That samples selected by the collector at the port of entry and deposited at the public stores should be examined on a reappraisement is a mandatory requirement of the law.—*Loeb & Schoenfeld v. United States* (1 Ct. Cust. Appeals, 385), (T. D. 31479).

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23354 (T. D. 30645).

[Reversed.]

*Curie, Smith & Maxwell* (W. Wickham Smith of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This case involves the validity of a reappraisement proceeding held by a general appraiser. The case was argued before this court and submitted with the case of *Loeb & Schoenfeld*, *supra* 385, previously decided. In that case we reviewed the law applicable to both cases, and there will therefore be no necessity for a consideration of the legal principles here involved. The underlying facts of the two cases, however, are so different as to require a different conclusion in this case upon the facts, and hence a separate consideration.

This case arose out of the importation of silk hatbands at the port of Philadelphia. The importation consisted of eight cases of that merchandise, all of which were duly entered for consumption, appraised, and in due course released from customs' custody and went out of the possession of the importer into consumption.

Entry, appraisal, and all proceedings were so had that the entry was liquidated on the 28th of November, 1906. On the 22d of December following the collector called for a reappraisement. When reappraisement was decided upon the collector called upon the importer for the goods or samples thereof, to which the importers replied that

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<sup>1</sup> Reported in T. D. 31507 (20 Treas. Dec., 754).

they had no samples, as the goods had gone into consumption. The reappraisement thereupon proceeded upon certain so-called "consular samples" furnished by the United States consul at Barmen, Germany, from which place the goods were exported.

It seems to have been the established practice of the consul at that point to take samples of such goods, which samples were before him at the time of the consulation of the invoice, and forward them to the port of proposed entry of the merchandise. It appears from the record, unchallenged, that in this case that practice was followed. The goods from which the samples were taken by the consul at Barmen were produced by one of the members of the exporting firm, who then stated that they were samples of the merchandise to be exported which was covered by the invoice produced. Thereupon the consul cut from the samples produced the "consular samples," so called, and forwarded them, properly identified, to the appraiser at the port of Philadelphia, who received them prior to the arrival of the merchandise.

At the hearing on the reappraisement it was testified that the goods had gone into consumption, and thereupon the general appraiser proceeded to reappraise the goods upon these so-called "consular samples." It appears that the general appraiser did not reappraise, nor did he have samples before him of, all lines of the goods; and that in such cases he declined jurisdiction for lack of samples. It thus appears that the samples furnished by the consul were not complete samples of all the merchandise.

The appellant, who was the protestant, maintains that an appraisement on such samples is not, and that this was not, a compliance with the statute. As we have already held, in the *Loeb & Schoenfeld* case, section 2901 of the Revised Statutes requires that the *collector shall select* at least one package of every invoice, and at least one of every ten packages of the importation for the purposes of examination in appraisement proceedings. We held in that case that these packages must be examined by the appraiser and board of general appraisers in order that a valid appraisement may obtain. The proceedings in this case, therefore, were an attempt to substitute, in the place of the samples designated by the law to be selected by the collector of a certain number and quantity in each invoice, samples designated by a United States consul abroad without reference to quantity or number of the packages covered by the invoice, and by him forwarded through the appraiser to the general appraiser holding the reappraisement. Indeed, the samples in this case, as shown by the record, were not even selected or taken from the importation by the United States consul, a Government official, but were produced at his office by a member of the exporting firm with a statement that they were samples of the merchandise covered by the invoice then being consulated. There was no regard had as to the statutory requirements relating to the number of

packages from which these samples should be taken. There was no determination, by any appraising officer whether, or not, the samples had of the designated packages were sufficiently representative of the designated packages. Indeed, the general appraiser returned the contrary. They were not selected by a person acting in the course of official duties under the constraint of official oath, but by an interested party, the exporter himself, acting not under oath as to these matters and at a place where he was beyond the jurisdiction or the processes of this country in case false oath were made, in such quantities and of such lines as he chose and by him submitted to the consul.

While this practice is a commendable one in the interests of a correct administration of the customs laws, in that it affords the appraising officers a check by which they can compare the consular samples with the regularly selected and designated samples in the appraisement of merchandise, we do not think it can in any sense be held a compliance with the law, that *the collector* shall select a certain number of samples of the importation and designate these for examination while in the customs' custody. The law admits of no substitute processes other than it provides; but, as we have held, is mandatory in its provisions.

It has been held by this court and by the Circuit Court of Appeals for the Second Circuit that where the law has prescribed that the dutiable value of merchandise shall be determined upon packages and samples selected in a certain way and by certain officials, that samples selected by other officials or parties can not be substituted therefor. *American Sugar Refining Co. v. United States*, *supra*, p. 228 (T. D. 31273); *United States v. Lueder* (154 Fed. Rep., 1).

The records show that in specific cases various witnesses and officials have endeavored to point out the lack of the necessity for the examination of samples or resort to the samples selected by the proper customs officials, and designated as prescribed by statute, acting under their official oaths in accordance with the command of Congress and the regulations of the department. In exceptional cases, undoubtedly, it may appear that justice may be had by a substituted procedure, but we think that the interests of all, until the prescribed procedure is duly changed, better subserved by a uniform observance of the methods prescribed by Congress and the regulations of the department, which epitomize the legislative wisdom and the experiences of customs officials and the Treasury Department in the collection of the customs revenues of the Government for over a hundred years. Any other course would be legislation.

This procedure, as thus prescribed, would seem to be sufficient. It is so calculated that ample opportunity is afforded, and ample time had, or may be had, upon the arrival of a cargo of imported merchandise, for the determination of not only the dutiable value of the merchandise but of all matters affecting the revenues. It is provided that

in no case can any part of such merchandise be taken from the customs custody until appraisement, reappraisement, and re-appraisement is had, except by consent of the customs officials. There is no limit upon the time within which these duties shall be completed by the appraising officers or those acting as such.

The importing merchant has the right to assume, upon his merchandise being delivered to him out of the customs custody, and sufficient action for all revenue purposes has been had and that it is no longer incumbent upon him to withhold his merchandise or any part thereof from the body commerce of the country in the interests of the Government's revenues.

We think that the Congress having prescribed that samples for examination in reappraisement cases shall be taken in certain numbers or quantities by certain officials, there can be no legal substitute therefor, except by legislation, which this court is not empowered to enact. The production before the appraisers of other samples, however much they may, and probably do, add to the correctness of their conclusions by way of comparison or otherwise, are nevertheless insufficient as a substitute for jurisdictional purposes.

*Reversed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

#### AUSTIN v. UNITED STATES (No. 422).<sup>1</sup>

##### 1. COVERINGS—SECTION 19, CUSTOMS ADMINISTRATIVE ACT OF 1890.

In the construction of section 19, customs administrative act of 1890, following the rule *ejusdem generis* laid down in *United States v. Nichols* (186 U. S., 298), the words "coverings of any kind," appearing in that section, must be taken to include coverings previously named therein, or coverings similar in kind, and used only to convey solids.

##### 2. SAME—CONTAINERS OF LIQUIDS AND SEMILIQUIDS.

Containers of liquids or semiliquids do not come within the descriptive language "Cartons, cases, crates, boxes, sacks, and coverings of any kind" as these words stand in said section 19, customs administrative act of 1890.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7082 (T. D. 30872).

[Reversed.]

*Walden & Webster, Curie, Smith & Maxwell* (W. Wickham Smith and Henry J. Webster of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

This case involves the appeals of Austin, Nichols & Co. and various other importers whose protests were heard with that of Austin,

<sup>1</sup> Reported in T. D. 31508 (20 Treas. Dec., 757).

Nichols & Co. by the Board of General Appraisers. The importations appear to have been made in the years of 1907, 1908, and 1909, and the cases were decided by the board on the 11th day of August, 1910.

The sole question involved is whether the value of certain containers, enumerated by the board as follows: (1) Wooden casks containing coal-tar colors in the form of paste; (2) hermetically sealed cans containing Brussels sprouts, and earthenware receptacles known as terrines containing pâté de foie gras; (3) earthenware jars containing strawberry and other jams, and stoneware jars containing marmalade; (4) hermetically sealed tins containing asparagus; (5) tin cans containing varnish; (6) hermetically sealed tin cans containing pineapples in chunks; (7) barrels containing certain alizarin pastes and other pastes—shall be included in the dutiable value of the merchandise contained in the same, under section 19 of the customs administrative act of 1890. The collector included in the dutiable value of the merchandise the value of such containers and the Board of General Appraisers sustained the action of the collector, following what they considered the controlling effect of the decision of the Circuit Court of Appeals in *Austin, Nichols & Co. v. United States* (171 Fed. Rep., 79), to which we shall later more particularly refer.

The importers claim that said containers are not dutiable at the same rate as the contents, or otherwise, but are free of duty. They assign as their reason for this contention that section 19 of said customs administrative act relates only to cartons, cases, crates, boxes, sacks, and similar coverings, suitable only for covering dry and solid merchandise, and that it has no application to containers of liquids and semiliquids.

With this was heard the case of *United States v. Edward Kimpton* (*infra*, p. 477), in which a brief opinion is concurrently filed, and the discussion here will refer to and determine the issues there.

The Supreme Court in the case of *United States v. Nichols* (186 U. S., 298), decided June 2, 1902, considered the meaning of section 19 of the customs administrative act of 1890, which we quote:

SEC. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported.

That the words "value" or "actual market value" whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in this section.

The Circuit Court of Appeals for the Second Circuit had submitted to the Supreme Court the following question:

Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?

It appears from the opinion of the Supreme Court that the merchandise referred to in the question submitted was imported in glass bottles holding not more than 1 pint and filled with goods dutiable at ad valorem rates. The Supreme Court answered the submitted question in the negative.

Thereafter the Circuit Court of Appeals for the Second Circuit in the case of *Kimpton v. United States* (171 Fed. Rep., 78), decided May 19, 1909, held in accordance with what it deemed to be the binding authority and effect of the decision in the case in the Supreme Court above referred to, that the value of stone bottles should not be added to the value of the imported ink contained therein; and in the case of *Austin, Nichols & Co. v. United States* (171 Fed. Rep., 79), decided the same day, the same Circuit Court of Appeals held that the value of tin cans containing vegetables and the value of stoneware receptacles containing fish paste and pâté de foie gras should be added to the value of the contents of such containers by virtue of said section 19 of the customs administrative act of 1890. The court distinguished the case from the *Kimpton* case, just decided by it, by saying that the *Kimpton* case involved liquids in bottles and the *Nichols* case the question of solids in tin cans and terrines. Reference to this claimed distinction will be made in connection with a later discussion of the *Nichols* case.

The contention of the importers in both cases before us proceeds upon the theory that the decision of the Supreme Court referred to is decisive of the same in their favor, while the contention of the United States is that said opinion when properly understood is not controlling in either of the cases. More fully stated, the contention of the importers is that the said Circuit Court of Appeals has correctly applied the decision of the Supreme Court in deciding the case of *Kimpton v. United States*, and that that decision is controlling in the *Kimpton* case before us. And further that the Circuit Court of Appeals in the *Nichols* case did not correctly apply the rule laid down by the Supreme Court, so far at least as it applied to containers of the kind before us; that if correctly applied it would have resulted in a contrary conclusion in said Circuit Court of Appeals, and therefore that the decision of the board in the *Nichols* case before us should be reversed. The United States specifically claims that the Circuit Court of Appeals

did not correctly apply the holding of the Supreme Court in the Nichols case to the Kimpton case; that if so applied that case would have been decided the other way, which results in the claim that we should reverse the judgment of the board in the Kimpton case before us. And further that the last-mentioned Nichols case in the Circuit Court of Appeals was correctly there decided and is controlling here, and therefore that we should affirm the judgment of the board in the Nichols case.

We think the decision of the Supreme Court if it be found directly applicable to the questions in either of the cases before us should control our action therein and proceed to inquire what was there decided.

The Supreme Court, by Justice Brown in the first part of the opinion, held that—

The customs administrative act of 1890 was not a tariff act, but was intended to simplify the laws in connection with the collection of revenues and to provide certain rules and regulations with respect to the assessment and collection of ad valorem duties and the remedies of importers, and not to interfere with any duties theretofore specifically imposed or thereafter to be imposed upon merchandise imported; \* \* \* that section 19 was intended to provide a general method for the assessment of ad valorem duties and to require the value of all cartons, cases, crates, boxes, sacks, and "coverings of any kind" to be included in such valuation.

He then proceeded to construe the meaning of the words "coverings of any kind," evidently assuming that the words "cartons, cases, crates, boxes, and sacks" did not include glass bottles, and said:

We think the rule *ejusdem generis* applies to the words "coverings of any kind," and that glass bottles which are never in ordinary parlance spoken of as coverings for the liquor contained in them is such a clear departure from the preceding words as to exempt them from the operation of the section, provided at least they are taxed under a different designation. It is very singular that if Congress intended to include under the words "coverings of any kind" vessels used for containing liquors, it should not have made use of the words casks, hogsheads, bottles, demijohns, carboys, or words of similar signification. The inference is irresistible that by the word "coverings" it only intended to include those previously enumerated and others of similar character used for the carriage of solids and not liquids. Webster defines a covering as "Anything which covers or conceals, as a roof, a screen, a wrapper, clothing," etc., but to speak of a liquid as being covered by a bottle which contains it is such an extraordinary use of the English language that nothing but the most explicit words of a statute could justify that construction.

So, too, by cartons, cases, crates, boxes, and sacks we understand those encasements which are not usually of permanent value and such as are ordinarily used for the convenient transportation of their contents. Indeed, it is quite possible that they were made taxable in a general way by the customs administrative act in order that if they were so made as to be of further use after their contents were removed they might not have escaped taxation. The ordinary cartons, cases, crates, boxes, and sacks are of no value after their contents are removed, but in order that they should not escape taxation altogether if they were of permanent value they were included in the general terms of the customs administrative act.

After having thus construed said section 19 the court proceeded to discuss subsequent legislation for the purpose, as we think, of pointing



out that the construction which it had just placed upon the section was in accordance with what must have been the understanding of Congress, as evinced by such subsequent enactments.

The language used by the court in introducing this part of its discussion seems to admit no other purpose. The court said:

The subsequent legislation upon the same subject tends to show that Congress intended to preserve the distinction between bottles and ordinary coverings and to make a special provision for them.

It is true that the concluding portion of the opinion limits the same to glass bottles, and it manifestly is so limited, because those were the precise containers involved in the answer to the submitted question, but we think it does not limit the construction that the court held should be given to section 19 as laid down in the earlier part of the opinion to the effect that the rule of *ejusdem generis* applies to the words "coverings of any kind" and that the *inference is irresistible that Congress intended only to include in the words "coverings of any kind" those previously enumerated and others of similar character used for the carriage of solids and not of liquids.*

The issue raised by the submitted question plainly was whether glass bottles containing liquids were included in the words cartons, cases, crates, boxes, sacks, and coverings of any kind, and the court said, in effect, that glass bottles were never, in ordinary parlance, spoken of as coverings for the liquor contained in them, and that it was very singular, if Congress intended to include vessels used for containing liquors under the words "coverings of any kind," it should not have made use of the words which in ordinary parlance signified containers of liquids, such as casks, barrels, hogsheads, bottles, demi-johns, carboys, or of other words of similar signification. Such language is utterly inconsistent with any interpretation of this opinion other than that it deliberately determined that containers of liquids were not referred to by the use of the words cartons, cases, crates, boxes, and sacks in said section 19, and we think that the Supreme Court intentionally based its negative answer to the submitted question upon the ground that such words in the section applied to containers of solids and not of liquids, that the rule of *ejusdem generis* limited the words "coverings of any kind" to similar containers of solids, that an examination of decisions of the courts and of subsequent legislation which it proceeded to make confirmed its previous conclusion that such was the intention of Congress, and we think the construction so given to the section is clearly in accord with the common understanding of the use and meaning of the words construed.

We are unable to perceive how any distinction can be made for the purposes of the issue before us between glass bottles and stone bottles. This results in our holding that in the Kimpton case in the Circuit Court of Appeals a correct conclusion was reached, that the judgment

of the Board of General Appraisers in the Kimpton case before us was correct and should be affirmed.

The Circuit Court of Appeals in the Nichols case (171 Fed. Rep., *supra*) attempted, as has been already seen, to distinguish between the containers in that and the Kimpton case by saying that the Kimpton case involved stone bottles used as containers of liquids, while the Nichols case related to tin cans and terrines used as containers of solids. This statement appears to be based upon the record sent up from the Board of General Appraisers. The board, however, had not found that the merchandise was solid and not liquid, and it appears from their opinion that amongst such merchandise there were fruit, jam, pineapples, liquid gum, and sizing. It is apparent that the board did not consider this merchandise to be solid, some clearly could not have been, and the character of its containers mentioned in their opinion warrants the inference that it was substantially like the merchandise in the Nichols case now before us for determination. On this subject the board in the case now before us says in its opinion that "the question involved is precisely the same" as that passed upon by the Circuit Court of Appeals in the Nichols case.

Counsel for the United States in the case before us premises his argument with the statement that some of the merchandise is a liquid, and the entire discussion of the case upon the part of counsel for both sides proceeds upon the theory that all the merchandise is liquid or semiliquid and all the containers water-tight and some of them hermetically sealed.

In view of all this we feel constrained to hold, either that the learned Circuit Court of Appeals was mistaken in the statement that the difference between the Kimpton case and the Nichols case, then before it, was that in the one case the merchandise contained was a liquid and the other a solid, or that the Nichols case so far as that aspect of it is concerned is not an authority here and that the Board of General Appraisers ought not to have so regarded it.

In the Nichols case, however, the court further said that it believed that it was the intention of Congress by said section 19 to require the value of all coverings to be included in the value of ad valorem goods and to support its conclusion as applicable to the goods before it referred to what it well characterized as the able opinion of General Appraiser Somerville for the board in that case. By referring to this opinion it will be found that the learned general appraiser in substance advanced the reasoning that such had been the uniform view of that section as expressed in the decisions of the courts and generally in customs practices until the decision of the Supreme Court in the Nichols case and that his interpretation of that opinion was that it—

went off on the ground that Congress had legislated for bottles *eo nomine* as a separate subject of duty, \* \* \* and so much as was said by the learned judge with

reference to the general condition of the word "coverings," while entitled to great respect is not to be considered as binding upon this board or the courts, especially when opposed to uniform decisions running through a series of not less than 10 or 12 years.

As we read the decision of Appraiser Somerville, if he had given to the opinion of the Supreme Court the effect we think it should receive as herein set forth the judgment of the board in that case would have been the other way, and hence this part of the decision of the Circuit Court of Appeals can not be an authority here.

But the Circuit Court of Appeals further said in the Nichols case that—

even if the doctrine of *ejusdem generis* be applicable so that the section reads "cartons, cases, crates, boxes, sacks, and similar coverings of any kind," we fail to understand why the coverings here involved may not be included. Webster defines "case" as "a covering, box, or sheath; that which incloses or contains." It is not easy to perceive why a tin box containing vegetables if not actually a case is not similar to one. So, too, an earthenware receptacle containing meat paste is a case, or if not is a covering similar to a case.

It already appears that in our opinion the decision of the Supreme Court has limited the containers referred to in section 19 to such as are used for the holding of solids and not of liquids, and which results in the conclusion that as to the containers before the Circuit Court of Appeals used for holding liquids the judgment of that court, in our opinion, failed to give full force to the conclusion of the Supreme Court in the Nichols case. Nor do we think it makes any difference whether the merchandise is a liquid or a semiliquid. Semiliquids must from their very nature demand receptacles for the carriage of the same that possess the requisite qualities to enable them to both contain and retain liquids, else the liquid portion of the semiliquid contained therein will escape, and hence, as we have already said in substance, we think section 19 must be held, in view of the opinion of the Supreme Court, to exclude from the containers therein mentioned those used for containing semiliquids, which, as we have already pointed out, is the case of all the containers referred to in the Nichols case now before us.

The statement of the Circuit Court of Appeals to the effect that if a tin box containing vegetables or an earthenware receptacle containing meat paste, is not a case, each is similar thereto, must be taken in connection with the fact that the learned court erroneously assumed that the containers before it held solids and not liquids, and therefore is not authority here. But we doubt if in common parlance the word "case" when referring to containers is applicable to an hermetically sealed or tightly stoppered, air-tight, or water-tight container. We think it generally refers to a receptacle, a box, a bag, a sheath, or a covering used for the purpose of keeping, holding, containing, inclosing, or covering solids, and does not refer to a small container required

and used for the purpose of carrying, keeping, and preserving liquids or semiliquids, the successful use of which container depends not only upon its ability to prevent the liquid portions of the contents from escaping, but also in many instances depends upon its further ability to prevent the outer air from coming in contact with the liquid or semiliquid substance contained therein.

But, however this may be, the conclusion we have reached as to the meaning of the decision of the Supreme Court in the case referred to and the controlling effect to be given the same require us to hold that the judgment of the Board of General Appraisers in the case be, and it is, *reversed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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CONSOLIDATED KANSAS CITY SMELTING & REFINING CO. v. UNITED STATES (No. 427).<sup>1</sup>

1. TARIFF HEARINGS, RELEVANCY OF PROCEEDINGS AT.

In determining the intention with which language has been employed in a paragraph of a tariff act some ambiguity therein must be apparent to warrant a resort to the "side lights" obtainable from tariff hearings.

2. LEAD-BEARING AND ZINC-BEARING ORES.

A commodity, it is true, is properly assessable in its condition as imported, but where ore, as here, is shown to have contained, as imported, both lead and zinc, the zinc appearing in a quantity exceeding 10 per cent, the metal content in both is dutiable, the lead under paragraph 181, the zinc under paragraph 193, tariff act of 1909.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7049 (T. D. 30727).

[Affirmed.]

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers affirming the assessment of duty made by the collector upon merchandise imported at the port of El Paso, Tex.

The merchandise in question consists of a number of shipments of ore from Mexico, each shipment containing lead in large or small percentage and each containing over 10 per cent of zinc. All were assessed with duty on both the lead and the zinc contents under para-

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<sup>1</sup> Reported in T. D. 31509 (20 Treas. Dec., 764).

graphs 181 and 193 of the act of 1909. These paragraphs read as follows:

181. Lead-bearing ore of all kinds, one and one-half cents per pound on the lead contained therein: *Provided*, That on all importations of lead-bearing ores the duties shall be estimated at the port of entry, and a bond given in double the amount of such estimated duties for the transportation of the ores by common carriers bonded for the transportation of appraised or unappraised merchandise to properly equipped sampling or smelting establishments, whether designated as bonded warehouses or otherwise. On the arrival of the ores at such establishments they shall be sampled according to commercial methods under the supervision of Government officers, who shall be stationed at such establishments, and who shall submit the samples thus obtained to a Government assayer, designated by the Secretary of the Treasury, who shall make a proper assay of the sample and report the result to the proper customs officers, and the import entries shall be liquidated thereon, except in case of ores that shall be removed to a bonded warehouse to be refined for exportation as provided by law. And the Secretary of the Treasury is authorized to make all necessary regulations to enforce the provisions of this paragraph.

193. Zinc-bearing ore of all kinds, including calamine, containing less than ten per centum of zinc, shall be admitted free of duty; containing ten per centum or more of zinc and less than twenty per centum, one-fourth of one cent per pound on the zinc contained therein; containing twenty per centum or more of zinc and less than twenty-five per centum, one-half of one cent per pound on the zinc contained therein; containing twenty-five per centum of zinc or more, one cent per pound on the zinc contained therein: *Provided*, That on all importations of zinc-bearing ores the duties shall be estimated at the port of entry, and a bond given in double the amount of such estimated duties for the transportation of the ores by common carriers bonded for the transportation of appraised or unappraised merchandise to properly equipped sampling or smelting establishments, whether designated as bonded warehouses or otherwise. On the arrival of the ores at such establishments they shall be sampled according to commercial methods under the supervision of Government officers, who shall be stationed at such establishments, and who shall submit the samples thus obtained to a Government assayer, designated by the Secretary of the Treasury, who shall make a proper assay of the sample and report the result to the proper customs officers, and the import entries shall be liquidated thereon, except in case of ores that shall be removed to a bonded warehouse to be refined for exportation as provided by law. And the Secretary of the Treasury is authorized to make all necessary regulations to enforce the provisions of this paragraph.

The importer claimed that it was improper to assess duty under both paragraphs, and that these ores were imported and smelted merely for the lead contents and should therefore be assessed with duty only under paragraph 181—the lead paragraph. The Board of General Appraisers overruled the importer's claim and sustained the action of the collector.

It is contended by the appellant that the records of the tariff hearing (vol. 3, p. 2612) show that the question was presented to Congress of specifically providing that where both lead and zinc appeared the ore should pay duty on both the lead and zinc contained, and that as the proposed amendment was not adopted the inference should be drawn that Congress intended that the ore should not be taxed for

both the lead and zinc content. The record of the tariff hearing shows that there was presented a proposed amendment to the law, reading as follows:

Lead-bearing ores of all kinds, 1½ cents per pound on lead contained therein; zinc-bearing ores of all kinds, 1½ cents per pound on the zinc contained therein: *Provided*, That all ores imported which contain both lead and zinc shall pay 1½ cents per pound on lead contained therein and also 1½ cents per pound on the zinc contained therein.

This proposed amendment was not adopted by Congress, but the language actually employed was that appearing in the sections quoted above. We can not regard this incident as controlling unless we shall find such ambiguity in the language employed as justifies resort to side lights. Many reasons might have suggested themselves to the Members of Congress why this particular language should not be employed, and among them is that it was thought best to exempt zinc-bearing ores entirely from duty where they contained less than 10 per cent of zinc.

It is next contended that lead-bearing ores and zinc-bearing ores are distinctly different articles of commerce, and that where the lead ore is recovered the zinc is not and where the zinc ore is recovered the lead is not. To place a construction upon the statute which would confer upon the importer the privilege of determining for himself to which use he would put the ores bearing both lead and zinc is perhaps possible, but before such a construction should be adopted we ought to be convinced that the intention of Congress vesting this privilege in the importer is made to clearly appear by the enactment.

It is said in the brief of counsel that we have a case showing that lead ore as it occurs in nature with a lower zinc content than 35 per cent can only be smelted for lead, whereas zinc ore is concentrated to increase the zinc content, and the lead present is penalized and lost.

We think this is a misapprehension of the record. Prof. Hoffman, a witness called for the importer, testified:

A. In zinc-smelting plants in the Joplin district there is a certain standard which forms the starting point from which zinc ores are judged, and zinc ores to be up to the Joplin standard, as it is generally called, must have 60 per cent of zinc.

Q. As a smelting proposition what approximately is the lowest percentage of zinc which can be profitably handled in charging the zinc smelter—charging it with ore?—A. The lowest zinc ore that is treated in retorts is that of Belgium, and in metallurgy we generally speak of the Belgium standard, which means that the ore should not contain less than 35 per cent of zinc.

On cross-examination he was asked:

Q. Do you mean to say that an ore containing less zinc than 30 per cent, we will say, is not a zinc-bearing ore?—A. Well, metallurgically you would not consider it a zinc ore since you can not make any profit in extracting the metal.

Q. But it is a zinc-bearing ore?—A. Yes; in a general way of talking. The definition of an ore is strictly that you must be able to make a profit. If you can not make a profit in extracting the metal it ceases to be, metallurgically speaking, an ore.

He further testified in answer to the question:

Q. If you had an ore that contained, we will say, 20 per cent of zinc and 20 per cent of lead, would it be possible to concentrate it to get the lead out and then go ahead and smelt the zinc?—A. In most cases it would. There is one celebrated case in which one has had considerable trouble, and that is in the Bolton Mills, New South Wales; but usually the lead mineral—that is, the galena—and the zinc mineral—the blende—are not so closely interwoven that you can not separate them more or less perfectly by mechanical means.

Q. Now, we have among our importations here, for example, an ore that contains 22.2 per cent of zinc and 9.5 per cent of lead; do you know of any commercial method by which it would be profitable to get the zinc out of that ore?—A. I should have to see the ore itself before I could say yes or no.

Q. There are some ores in which that is entirely possible?—A. It is possible, perhaps, with a majority of ores; but there are ores in which the lead mineral and zinc mineral are so closely interwoven that you can not separate them mechanically or by a concentration method, which is the same thing.

Q. And there are ores in which, for example, the zinc is 20.3 per cent and the lead is 20.9 per cent, and it would be quite feasible to commercially get out the zinc from the ore?—A. Yes; there are a great many ores of that kind.

Q. Or to get the lead, either?—A. Why, you separate the lead from the zinc, so you get them both.

Q. As a commercial proposition?—A. There are a great many ores, yes, of that kind.

\* \* \* \* \*

Q. Is it or is it not necessary to concentrate ores in preparation for zinc smelting?—A. It is practically always done.

Q. That is an additional expense, is it?—A. Well, the zinc smelter has got nothing to do with the mechanical concentration, just as little as the lead smelter.

Q. But does the lead smelter require his?—A. He requires the zinc ore to run 35 per cent of zinc, and it is the miner's business to furnish him the material.

Q. And does it require further an absence of gangue?—A. If we have 35 per cent of zinc—call it 50 per cent blende, because zinc and sulphur form the blends—we have 50 per cent of gangue. I am guessing approximately.

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Q. According to your definition, if an ore contained both lead and zinc in such quantities that both could be profitably extracted that ore would be both a lead-bearing and a zinc-bearing ore, would it not?—A. Yes.

Q. An ore sometimes does occur with only 10 per cent of zinc which you would consider a zinc ore?—A. If it can be concentrated mechanically before it goes to the zinc-smelting plant.

Q. But there are ores in existence having as little as 10 per cent of zinc which can have that zinc profitably extracted?—A. Yes.

Q. And as regards the lead, it runs as low as what percentage would you say?—A. There are ores running in metal 4 per cent, and I know of ores running 3 per cent.

Q. Does it run as low in the zinc as it does in the lead?—A. I could not answer that question offhand.

On reexamination he was asked:

Q. I call your attention to one of the shipments here where the assay shows 54.5 of lead content and 10.4 of zinc content; would it be profitable to separate in an ore of that kind, assuming that it could not be mechanically concentrated, the zinc from the lead?—A. Well, it would depend on the local conditions. If the two minerals were mechanically separable why you would surely separate them, not only to recover your zinc, but in order to reduce your loss in smelting the lead.

Q. Would the process of concentration in a case of that kind—would the expense of concentration be overcome by the recovery of the zinc? A. Yes; decidedly.

So it appears by this testimony most clearly that ores may be both zinc-bearing ores and lead-bearing ores, and that each of the ores may be recovered and the ore profitably manipulated for their recovery by the process of concentration and smelting several ores by the appropriate method. This being the case, it is hardly conceivable that Congress intended that zinc-bearing ore which also contained lead might be dutiable only for the zinc or that lead-bearing ore which contained zinc might be dutiable only for the lead. A most significant feature of this act is that while the actual smelting of zinc ores is only practicable when there is present 35 per cent of the zinc content, section 193 in very clear terms makes all zinc-bearing ore containing 10 per cent subject to duty. It is very clear from this that it was within the contemplation of Congress that ores which required mechanical treatment to concentrate them in preparation for the retort used in reclaiming the zinc should be dutiable in their crude state. Indeed this language requires that all ores containing a greater quantity than 10 per cent of zinc must be treated as zinc ores and assessed under paragraph 193. As is pointed out by the Board of General Appraisers in their opinion, Congress has provided for a duty on the metal content of ores rather than on the recovered metal itself.

It is contended that the construction of this statute should be controlled by section 24, which reads as follows:

Sec. 24. That the works of manufacturers engaged in smelting or refining, or both, of ores and crude metals, may upon the giving of satisfactory bonds be designated as bonded smelting warehouses. Ores or crude metals may be removed from the vessel or other vehicle in which imported, or from a bonded warehouse, into a bonded smelting warehouse without the payment of duties thereon and there smelted or refined, or both, together with other ores or crude metals of home or foreign production: *Provided*, That the several charges against such bonds may be canceled upon the exportation or delivery to a bonded manufacturing warehouse, established under section twenty-three of this act, of the actual amount of lead produced from the smelting or refining, or both, of such ores or crude metals: *And provided further*, That said lead may be withdrawn for domestic consumption or transferred to a bonded customs warehouse and withdrawn therefrom upon the payment of the duties chargeable against it in that condition: *Provided further*, That all labor performed and services rendered pursuant to this section shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer: *Provided further*, That all regulations for the carrying out of this section shall be prescribed by the Secretary of the Treasury.

We think this section can not be given a construction which would render unavailing an assessment on metal other than lead. The record in the case before us does not show that the importer proceeded under this section. All we have before us is the question of whether the liquidation of the collector upon the importation was correct, and we do not think that section 24 should be construed as modifying or abrogating the provisions of section 193 imposing a duty upon all zinc-bearing ores containing more than 10 per cent of zinc.



It is urged that the duty must be assessed on goods, wares, and merchandise in the condition as imported. This is accepted. But it is the zinc content of these ores when imported that is in controversy here, and the zinc content, if in excess of 10 per cent, is dutiable under the express terms of section 193.

The same consideration answers the suggestion that articles are not to be separated into their elements for the purpose of classification. There is no separation into elements of this ore. There is an ascertainment of the contents of the ore, and the duty is levied upon such contents. What happens to the ore thereafter is a matter of no concern to the collector and is not a matter which was considered by Congress in enacting the statute. This statement also answers the suggestion that chief use is controlling. It is enough to demonstrate that this ore is dutiable for the zinc content, to show that it contains in excess of 10 per cent of zinc when coupled with the fact that ordinarily ore containing both lead and zinc may be mechanically treated so as to make it commercially practicable to recover both the lead and the zinc ores.

The decision of the Board of General Appraisers is *affirmed*.

SMITH, BARBER, and DE VRIES, Judges, concur.

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UNITED STATES v. KIMPTON (No. 471).<sup>1</sup>

STONEWARE INK BOTTLES NOT "COVERINGS."

Following and in accord with the reasoning of *Austin, Nichols & Co. et al. v. United States*, *supra* (T. D. 31508), no distinction could be made in containers between stoneware bottles and those of glass, and so stoneware bottles were not dutiable as "coverings" in the sense that term is employed in section 19, customs administrative act of 1890; and, as with glass bottles, their value should not have been added to the dutiable value of their contents.

United States Court of Customs Appeals, April 10, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7083 (T. D. 30873).

[Affirmed.]

*Walden & Webster, Curie, Smith & Maxwell* (W. Wickham Smith and Henry J. Webster of counsel) for appellee.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

In 1906, 1907, and 1908, the appellee imported at New York certain ink contained in stone bottles of four different sizes. The collector

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<sup>1</sup> Reported in T. D. 31510 (20 Treas. Dec., 769).

included the value of the bottles in determining the value of the ink, and assessed duty upon this aggregate value under paragraph 26 of the tariff act of 1897, which reads as follows:

26. Ink and ink powders, twenty-five per centum ad valorem.

The value of the bottles was so included by virtue of section 19 of the customs administrative act of June 10, 1890. The importer protested, hearing was had before the Board of General Appraisers, and on August 11, 1910, its decision was rendered sustaining the protest with instructions to reliquidate the entries accordingly. Thereupon the United States duly appealed to this court.

No question was made before the board or in this court that the ink was not properly assessed. The decision of the board was based upon what it considered was the controlling effect of the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Kimpton v. United States* (171 Fed. Rep. 78), decided May 19, 1909. It appears by referring to the opinion of the Circuit Court of Appeals in the *Kimpton* case above referred to that it rests upon the authority of *United States v. Nichols* (186 U. S. 298), decided June 2, 1902.

It is not claimed that the merchandise in the case now before us is different than that in the *Kimpton* case, and it is admitted that if the decision in that case was a correct exposition of the law no error was made by the board in the case at bar.

We have fully considered the effect of the decision of the Supreme Court in the *Nichols* case, in the case of *Austin, Nichols & Co. et al. v. United States*, which was heard with this case, in which our opinion, *supra*, p. 465 (T. D. 31508), is filed concurrently with this, and to which reference may be made for a discussion of the questions involved.

It is sufficient here to say that on the authorities above mentioned the judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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### STEIN v. UNITED STATES (No. 31).<sup>1</sup>

#### 1. COMMISSIONS PAID APPEARING IN VALUATION ON ENTRY.

Reaffirming the doctrine of *Stein & Co. v. United States*, *supra*, p. 36 (T. D. 31007), that an item in an importer's invoice showing he had paid a commission to a commissionaire had been included there under duress, it is now further held that the figures on entered valuation certified to the appraiser by the collector wherein this payment was included did not constitute an opinion, judgment, and voluntary act of the importer, but something entirely different; the importer has been without a day in court when by a penalty threatened he is compelled to substitute the judgment of another for his own in declaring the value of his goods, and he is irremediably denied a legal right.

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<sup>1</sup> Reprinted in T. D. 31525 (20 Treas. Dec., 795).

## 2. MEMORANDUM SHOWING IMPORTER'S VALUATION.

A memorandum slip attached to each invoice that showed the change the importer had wished to make in the valuation as entered is not such an entry as could be taken to comply with the statute. The importer was entitled to make upon the entry itself his protest against the addition by the collector of commissions paid as a part of the dutiable value.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York  
G. A. 6742 (T. D. 28886).

[Reaffirmed.]

*Curie, Smith & Maxwell* (W. Wickham Smith of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief),  
for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Rehearing in the above-entitled case, decision of which was reported in Court of Customs Appeals, *supra*, p. 36 (T. D. 31007), reference to which is here had for discussion of the issues other than those urged upon the reargument.

The causes involve commissions paid upon Bradford goods and whether or not they constitute dutiable items in the particular cases. Eliminating those portions of the briefs for the Government which discuss a condition of facts not found within this record, the relevant points made in the petition for rehearing, the briefs, and upon the argument are two. First, it is contended that the court made error in directing liquidation upon the invoice values after holding the appraisement invalid. After more mature consideration, upon rehearing the Government abandons this position as untenable and states:

In our petition for rehearing it was suggested that if the appraisement was to be held invalid this court should remand the case with instructions that a proper appraisement be held. \* \* \* However, since receiving the appellants' brief and considering the authorities there cited (pp. 4-6) we deem the matter very doubtful, and we accordingly refrain from pressing it or taking up any of the time of the court in discussing it.

Further discussion, therefore, of this point is unnecessary. It might be meet to say that in the case of *Erhardt v. Schroeder* (155 U. S., 124) the Supreme Court of the United States long ago definitely settled that question. It would be idle to cite or quote from any of the numerous other decisions of the Supreme Court of the United States and other courts holding precisely the same.

The other point insisted upon by the Government at the oral argument is that article 410 of the Customs Regulations of 1889, then in

force, is directory and not mandatory. A more careful study of the opinion of the court will reveal that it was not alone because of the failure to pursue the regulation which the court held to have invalidated the subsequent appraisement, but also by reason of the additional and equally if not more important reason that inasmuch as the entry itself was induced by duress it was therefore invalid and not binding upon the importer and that not only was article 410 not followed, but no valid entry had been made at the time of the appraisement.

Article 410 reads:

410. Every invoice, as soon as entered, shall be stamped with the date of entry and certified by the signature of the collector or his deputy, and the officers whose duty it is will compare the classification made by the importer with the description given in the invoice and will see that the merchandise is classified at the rates provided by law. \* \* \*

The rates of duty charged upon entry and the entered value shall be duly stated on the invoice for the information of the appraisers. The duties shall be estimated on the appraised value, the invoice certified, and a permit for delivery filled out.

The collector shall then transmit all the papers to the naval officer (if any), who shall make a like examination, estimate the duty, check the invoice, entry, and permit, if found correct, and, retaining the duplicate entry, return the original and other papers to the collector, who will promptly transmit the invoice to the appraiser.

The portion thereof not followed was the failure to certify to the appraiser, in accordance with the regulations, for his consideration in appraising the goods the importer's voluntarily entered value of the merchandise. The only entered value existing being one made under duress by the importer it was impossible to so certify. Not only were the figures certified to the appraiser as the entered value not the opinion, judgment, and voluntary act of the importer, but something entirely different, to wit, the figures which the judgment of others determined should be the entered value.

We need go no further for authority upon what constitutes a directory and mandatory provision of law than any of the elementary works. Indeed, the very decision cited by the Government counsel upon rehearing enunciates in succinct terms that rudimentary doctrine.

In *French v. Edwards* (13 Wall., 506, 511) the Supreme Court said:

But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory.

The requirement of article 410 of the regulations, not complied with in this case, comes precisely within that rule. Why is it required by the regulation that the collector shall certify to the appraiser the entered value of the merchandise? Is it a mere idle requirement? We think it wise, just, and mandatory.

It is the only method under the law and the regulations whereby the importer can "have his day in court" before the appraiser in the first instance when his merchandise is being appraised. The importer's valuation might not and often does not agree with the invoice value. It might be too high or it might be too low, or he might know of fraud in the invoice value, in any of which cases it is his right to protect himself and his property by making corrections by his entered value. It being his opportunity for a hearing before the appraiser and to register his judgment for that official before his goods are appraised, the regulation implicitly requires that in the appraisement of his goods his estimate of the value shall be taken into consideration in this manner. The record shows that in these cases they were so considered by the appraiser. Failing to certify the importer's true judgment upon this point and certifying some other value which is the judgment of another or others and not of the importer, denies the importer the right to be heard before the appraiser, to this extent at least, and substitutes the judgment of some other person or persons for the judgment and evidence of the importer himself in the appraisement of his property. It seems to us almost idle to add that the denial to the citizen of a right to be heard, afforded him by law, when his property is being taken for the purposes of the state, is certainly "such a disregard of his rights as might result injuriously."

Moreover, a more serious result follows. It is required by law that in no case shall duty be taken at less than the entered or invoice value, whichever be the higher.

The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value. (See sec. 7, customs administrative act.)

The importer therefore had the right, believing the invoice and dutiable market value of his goods to be less, to enter them at that value. When the importer is constrained by duress to enter goods at a higher value than this he is denied a substantial right afforded by law, in that he deprives the appraiser of the power to make an *effective* appraisement at less, and the collector of the power to take duty at less, than this involuntary entered value. Even though he appealed to a single general appraiser, or a board of three general appraisers, and exhausted his remedy under the law, he is still forestalled from having duty taken upon his goods at less than their entered value, whatever may be their appraisement. Under the circumstances it seems to us that the proposition is too simple for discussion that when the importer is thus denied the right to enter his goods at a lower value and is thus constrained to enter them at a higher value, upon which duty under the law must be taken, that

his rights are not alone disregarded within the language of the Supreme Court of the United States, but that he is seriously as well as injuriously affected.

Bearing this fundamental principle in mind, let us look to the decisions cited by the Government counsel claiming to support its contentions. The one case necessary of any consideration whatever in this connection, instead of disputing, affirms the doctrine. That case was *United States v. Ranlett* (172 U. S., 133). It was there held that the requirement of section 2901 of the Revised Statutes that the appraiser should examine the packages forwarded by the collector under that section was, in that class of cases, directory and not mandatory. Without commenting further upon the precise point there involved in contrast with that involved in *Oelbermann v. Merritt* (123 U. S., 356) and similar cases, it is sufficient to say that an examination of the law will show that that was not an omission the consequences of which could not be relieved against in the due course of law by the importer himself, and the decision of the Supreme Court of the United States is expressly rested upon that fact. The court said:

\* \* \* If the importers believed that they had sustained injury because more bales were not opened, they should have applied for a reexamination, and they might have produced evidence before the Board of General Appraisers to maintain their claim. \* \* \*

Nevertheless, the court actually rendered judgment in that case in favor of the importers, reciting as one of its reasons—

\* \* \* considering that the statute was not strictly pursued in the examination \* \* \*.

See also *Erhardt v. Schroeder* (155 U. S., 124).

The condition is perfectly obvious, and the one Supreme Court case illustrates the doctrine as well as the other. In the *Ranlett* case the rights of the importer were not cut off by the failure to pursue the statute upon the part of the customs officials, because he could have produced evidence before a board of general appraisers to maintain his claim; and if their decision was unsatisfactory he could have appealed to the courts and pursued the same course. Construing all these statutes together, section 2901 and other provisions of the customs administrative law as a whole, we find that in the *Ranlett* case the importer, while denied a right, was not concluded by that denial, but was afforded relief by other provisions of the statute. In the case of this importer there is no relief afforded by statute or regulation for the rights denied him, for the law is imperative that under no condition or circumstances can duty be taken at less than the entered value. He is, therefore, irremediably denied a legal right.

It will be particularly noted that in all these cases it was the failure of the appraiser to examine the packages legally required to be sent to him by the collector, and not the failure of the collector to deliver to the appraiser that legally required number of packages which is the kindred point here involved.

In *United States v. Phillips* (46 Fed. Rep., 466) it was held that the failure of the collector to retain and submit the statutory samples to the appraiser rendered the appraisement invalid. See also *United States v. Murphy* (136 Fed. Rep., 811).

The allusion in the Government's petition—"it must not be forgotten that to each invoice in this case there was attached a memorandum slip showing the addition which the importer wished to make"—affords no relief. The statute says that duty shall not be taken at less than the entered value and no number of tags or figures pinned to the entry or to any other of the papers in the record would afford relief in the premises. It seems quite illogical to contend that no notation could under the law be made upon the entry of a protest against the addition of these commissions as dutiable value, or in any other language except in the language of the statute, reject them for that reason, and then to maintain that they should be considered as a legal part of the entry when pinned to it on a tag. If the law did not permit the collector to receive an entry which included them as a part, how could the law compel the appraiser to consider them as a part of the same entry?

The appraisement being invalid for jurisdictional defects, the character of the notation of the appraising officer would become unimportant. Moreover, the notations made in this case serve to emphasize what has been before said because they conclusively show that they were taken into consideration by the appraising officer in determining dutiable value. Indeed, the form of the appraiser's notation should not be conclusive of a legal right, for in the very case cited by counsel for the Government as "a clear statement from an eminent court," that court said on this precise point of the character of notations made by the appraising officers herein, in *Erlanger, Blumgart & Co. v. United States* (154 Fed. Rep., 949):

The appraisers can not include in their valuation some improper item, such as ocean freights from the foreign country to the United States, and cut off all inquiry as to their action by merely inscribing on the entry a statement that they added the item "to make market value."

The order as made by the court was correct.

*Reversed.*

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and MARTIN, Judges, concur.

BEER v. UNITED STATES (No. 73).<sup>1</sup>

## 1. SECTION 11, CUSTOMS ADMINISTRATIVE ACT OF 1890.

That part of section 11, customs administrative act of 1890, relating to the proper ascertainment of dutiable value by an inquiry as to the sale price of the commodity in the United States, is a definition of the powers granted appraising officers in appraisement proceedings, and there is nothing contained there to limit the scope of that provision to cases where no foreign market value appears; it seems rather in fact intended to aid appraising officers to ascertain true foreign market values.

## 2. SAME—DOMESTIC WHOLESALE PRICE AS A GUIDE.

It is not unfair to the importer to employ, as a basis for computing what was the true value of the commodity on export abroad, the wholesale selling price of a commodity fixed by himself, and the very language of the statute authorizes this to be done.

## 3. AN APPRAISEMENT BY BOARD OF THREE GENERAL APPRAISERS.

Where a board of three general appraisers, with jurisdiction of the subject matter and the persons, have proceeded in conformity to law to appraise an importation of goods, their finding is not reviewable by any classification board or by this court.

## 4. VALIDITY OF PRECEDING APPRAISEMENTS.

If a reappraisement by a board of general appraisers be held valid it is unnecessary to inquire into the validity of preceding appraisements of the same merchandise.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6788 (T. D. 29144).

[Affirmed.]

*Curie, Smith & Maxwell* (W. Wickham Smith of counsel) for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The importer, appellant here, assails the validity of the appraisement, reappraisement, and re-reappraisement of certain embroidered robes.

Concededly, the principal market of the country for such merchandise was St. Gall. There is no controversy as to the rate of duty applicable, but the question here raised concerns the validity of the different appraisement proceedings.

It is contended by the appellant that each and all of the appraisements were invalid for two reasons: First, that neither the imported merchandise nor the legal packages or samples were before any of the appraising officers at the time appraisement was had; second, that the appraising officers based their appraisement in each case upon the wholesale price at which the goods were sold in this country and not the country of exportation. The board held as to the first point that the evidence showed that proper samples were before

<sup>1</sup> Reported in T. D. 31526 (20 Treas. Dec., 800).



the appraising officers in all the appraisement proceedings and were duly examined by them. On appeal to this court the appellant abandons that contention, stating that the testimony in that particular was conflicting. We fully concur in the finding of the classification board of general appraisers upon this point. The record shows, in our opinion, without serious contradiction, that not only were the requisite number of packages within section 2901 of the Revised Statutes before the board, but out of an abundance of caution and a commendable desire to arrive at a fair and just market value of the merchandise the board called for and examined additional samples which were produced by the importer. The testimony of Mr. D. P. Dutcher in this particular, while it referred to matters occurring several years before, is so amply supported by the reasons assigned by him for accurate memory in the particular cases that it is thoroughly convincing. We think the record shows beyond controversy that there were before the board and proper examination thereof made of requisite samples for jurisdictional purposes.

If the re-appraisement by the Board of General Appraisers was valid, inquiry as to the validity of preceding appraisements is unnecessary. We, therefore, confine our discussion of the case in the main to the proceedings before the board of three general appraisers, which, if conducted in conformity with the modes prescribed by the law, is final, and not the subject of review by any classification board of general appraisers or by this court.

The case of the appellant, as stated in his brief, in substance is, that the local appraisers sent for the importer and demanded of him the price in dollars and cents at which he, the appellant, had sold the goods in the United States; that this was furnished and was put in evidence in the proceedings before the board; that the local appraiser then proceeded to work back from this American selling price to an estimated foreign value in accordance with a definite formula. A copy of this formula was put in evidence and also the calculations based thereon as applied to the American selling price. The prices fixed by the local appraiser were adopted both by the general appraiser and the Board of General Appraisers without change.

It is maintained that this procedure was in violation of the provisions of section 11 of the customs administrative act of 1890, as amended and in effect at the time of these appraisement proceedings.

Section 11 at that time was as follows:

SEC. 11. That when the actual market value, as defined by law, of any article of imported merchandise wholly or partly manufactured and subject to an ad valorem duty, or to a duty based in whole or in part on value, can not be otherwise ascertained to the satisfaction of the appraising officer, such officer shall use all available means in his power to ascertain the cost of production of such merchandise at the time of the exportation to the United States, and at the place of manufacture; such cost of production to include the cost of materials and of fabrication, all general expenses cover-

ing each and every outlay of whatsoever nature incident to such production together with the expense of preparing and putting up such merchandise ready for shipment, and an addition of not less than eight nor more than fifty per centum upon the total cost as thus ascertained; and in no case shall such merchandise be appraised upon original appraisal or reappraisal at less than the total cost of production as thus ascertained. *It shall be lawful for appraising officers, in determining the dutiable value of such merchandise, to take into consideration the wholesale price at which such or similar merchandise is sold or offered for sale in the United States, due allowance being made for estimated duties thereon, the cost of transportation, insurance, and other necessary expenses from the place of shipment to the United States, and a reasonable commission, if any has been paid, not exceeding six per centum.*

The appellant contends that the last provision of section 11 did not authorize taking into consideration the market value of imported merchandise in this country except in cases where there was no foreign market value, and, as they claim to have shown a market value at St. Gall for such embroideries, that the invoking by the appraising officers of section 11 was in violation of law. We are unable to concur in the premises of this conclusion.

Section 11, as then in force, appears to have been a divisible section.

Without discussing the cases to which the first portion thereof is applicable, the second portion appears an independent definition of the powers granted an appraising officer in appraisement proceedings. There is nothing in the paragraph which limits the exercise of that provision to cases where there is no foreign market value, but it seems a general provision intended as an aid to appraising officers in the ascertainment of foreign market value. "Such" in the last paragraph would seem to be referable to "any article of imported merchandise" without qualification. In any event the only qualification in either paragraph is not the *absence* of foreign market value, but that foreign market value "can not be otherwise ascertained to the satisfaction of the appraising officers."

The appellant further insisted that the appraising officers did not legally follow the method prescribed by section 11, the claim being that taking into consideration the actual price at which the merchandise actually imported was sold at wholesale in this country, and working back by deduction by the methods prescribed in the statute, was not a compliance with the provision requiring that the wholesale price at which *such or similar merchandise* was offered for sale in the United States. The claim is that the language of the statute excludes the right of appraising officers to take into consideration the wholesale price at which the precise merchandise was sold, but they are to take into consideration prices at which similar merchandise was marketed in the United States. We are unable to concur in this view. No better test, certainly no fairer test to the importer, could have been had as a basis of proceeding under this law than the wholesale price of the precise importation as sold by the importer himself, and that we deem within the very language of the statute

authorizing the appraiser to take into consideration the wholesale price of "such" merchandise.

The Board of General Appraisers found, and we think properly, that there was not sufficient evidence in the record going to prove the provisions of section 11 were not followed by any of the appraising officers, and particularly the board of three general appraisers. We think that finding of the board amply supported by the record. Moreover, in our view of the law covering appraisement proceedings it was unnecessary for the board of three general appraisers to have gone further in order to give them jurisdiction and render their appraisement proceeding valid than the statement of the actual proceedings of the board in the appellant's brief as his case of complaint against the same.

When it is stated by the appellant in effect that the board of three general appraisers received in evidence the wholesale price at which the imported merchandise was sold in this country and proceeded therefrom *as a basis* to work back from that selling price to ascertain the foreign dutiable value, making all the deductions allowed by section 11, although thereafter proceeding in accordance with a formula which had been gotten up for such cases, the board acted fully within its legal prerogatives. That is to say, the board had jurisdiction of the subject matter of the proceeding by virtue of the statute giving them final appellate jurisdiction in appraisement cases; that they had jurisdiction of the persons interested in the proceeding must be assumed from the fact that the importer was present in person and by counsel; and that having jurisdiction of the subject matter and of the persons, and having proceeded in accordance with the methods prescribed by the statute and regulations for appraisement proceedings, that appraisement was in our opinion a valid appraisement. Whatever evidence was accepted by the board so acting, whatever formulas may have been adopted by them in their efforts to ascertain the dutiable value prescribed by statute, if they had fully complied with the mandatory requirements of the statute and regulations, are not reviewable by any classification board of general appraisers or by this court. The decisions of the courts upon this point are uniform.

It will be noted in passing that it is conceded by the appellant that all of the proceedings and formulas of the board were devoted to the end of the ascertainment of a wholesale foreign market value in the country of exportation, and that the board is not here charged, nor does the evidence in the record in anywise indicate, that the board endeavored to adopt the American wholesale price as the dutiable value of the goods. They only considered the American wholesale price, if at all, as a basis from which they proceeded in all respects as authorized by the statute to the ascertainment of a foreign market value. It likewise appears that in the ascertainment of this foreign market

value the board not only made the deductions provided by section 11, but they made further calculations in that effort by virtue of a divisor based upon some method of calculation, which does not appear in this record, which was satisfactory to them and which is not the subject of review under the circumstances by this court.

What force and effect the board gave to the direct evidence of foreign market value which was in the record, what formula they may have adopted in seeking to ascertain that value after having complied with section 11 by adverting to the American wholesale price, and whether they gave one or the other classes of evidence thus ascertained predominant effect are beyond the matter of review by this court.

In *Passavant v. United States* (148 U. S., 214-220) the Supreme Court observed:

The provisions of the customs administrative act of June 10, 1890, as to the *finality and conclusiveness* of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in *clearer and more emphatic terms than in former statutes*.

The case of *Muser v. Magone* (155 U. S., 240) is equally if not more applicable. That case involved the appraisement of similar merchandise also imported from St. Gall. In that case, after much disturbance in the trade generally and seemingly insuperable difficulties had been encountered in the ascertainment and fixing of a fair dutiable market value of such merchandise, owing to the fact that there were no sales of the completed article in the country of exportation, the committee appointed by representatives of the Treasury Department and the importers of such merchandise in the United States agreed upon a formula to be exercised by appraising officers in the ascertainment of such values. Values fixed by that formula have since come to be known as the "stitch-rate" values. Its legality and the right of appraising officers to exercise the same under the statute in the ascertainment of dutiable market value was assailed, and that question eventually reached the Supreme Court of the United States.

Speaking of the same, that court said (p. 251):

The presumption is that a sworn officer, acting in the discharge of his duty, upon a subject over which jurisdiction is given him, has acted rightly, and there is nothing in this record which, in the slightest degree, tends to indicate that the general appraiser did not endeavor by all reasonable ways and means to arrive at the true and actual market value. Among such ways and means are market price or the quotations for a given day; amounts realized on sales, public and private; and in some instances the cost of production. The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transactions. How these various elements impressed the general appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final, and could not be reviewed, and the verdict of a jury substituted.

The concluding language of the court is too pertinent to the present case to be omitted (p. 252):

The proper evidence of the decision of the appraisers and of the collector was to be found in *their official returns*, and if they acted without fraud and within the powers conferred on them by statute, their decision could not be impeached by requiring them to disclose the reasons which impelled their conclusions or by proving *remarks they may have made in the premises*.

The official return of the Board of General Appraisers in this case was as follows:

We have examined the following described merchandise, imported by H. S. Beer in the *La Gascogne*, from St. Gall, January 26, 1898, and do hereby certify that, in our opinion, the actual market value or wholesale price of the said goods, at the time of exportation to the United States, in the principal markets of the country whence imported, was, and we do hereby appraise the same, as follows.

While this court finds it unnecessary in this case to express an opinion as to the conclusiveness against impeachment by testimony of this return of the board, we think the facts and law of this case leaves that finding of the board unimpeached.

*Affirmed.*

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and MARTIN, Judges, concur.

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SMITH v. UNITED STATES (No. 148).<sup>1</sup>

RELIQUIDATION ON ORDER OF BOARD FOLLOWED BY A NEW PROTEST.

Where an importer's protest against the inclusion of certain bottle charges in an assessed valuation had been sustained and a reliquidation by the collector ordered, the importer interposed a new protest with the collector, asserting his right to a new assessment on the contents themselves of the bottles and at a lower rate than that which had been originally fixed: *Held*, in the proceedings that ensued on reliquidation the collector made no "decision" from which an appeal would lie; he was acting ministerially, and the importer having failed within the time prescribed by law to protest against the original assessment as to the value of the contents of the bottles and to appeal therefrom, that assessment is *res adjudicata*.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
G. A. 6919 (T. D. 29884).

[Affirmed.]

*B. A. Levett* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from the Board of General Appraisers to the United States Circuit Court for the Southern District of New York, transferred to this court under the provisions of the act of August 5, 1909.

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<sup>1</sup> Reported in T. D. 31527 (20 Treas. Dec., 805).

The decision of the Board of General Appraisers was rendered upon an agreed statement of facts. From this statement it appears that certain "preserved cherries in maraschino in glass," or "preserved cherries in glass in maraschino," were, during the months of August, September, and October, 1906, imported by James P. Smith & Co., of New York, at that port.

The glass in which the cherries were imported consisted of bottles. Duty was assessed upon the contents at the rate of 1 cent per pound and 35 per cent ad valorem under the provisions of paragraph 263 of the tariff act of 1897. Against this liquidation and assessment of duty on the cherries the importers neither filed a protest or notice of dissatisfaction claiming any different rate of duty or different classification of the cherries nor objected in any way to the assessment of duty upon the cherries.

Duty was assessed upon the bottles containing the cherries at the rate of 40 per cent ad valorem under the proviso to paragraph 99 of the tariff act of 1897, the provisions of which are here unimportant.

Wherever the invoices showed charges for corking, wiring, capping, labeling, casing, or other items incident to placing the merchandise in condition packed ready for shipment to the United States, the collector added such amount to the value of the bottles, which he assessed for duty at the rate of 40 per cent ad valorem.

The importers duly filed protests with the collector against this assessment of duty, claiming "the valuation of the bottles for the assessment of duty should be that of the bottles *per se* without the addition thereto of any charges whatever; *or in any event a portion of the charges which have been added to the value of the bottles per se for the assessment of duty applies only to their contents.*"

The board on February 29, 1908, Abstract 18406 (T. D. 28833), rendered decision, sustaining this protest and directed reliquidation, as follows:

(1) As to the filled bottles, the cost or value of the charges for corking, wiring, capping, labeling, casing, or other items incident to placing the merchandise in condition packed ready for shipment to the United States, shall not in anyway be added or apportioned to the value of the bottles, but that said bottles shall be assessed with duty at the specific or ad valorem rates prescribed by paragraph 99, tariff act of 1897, according to the value of the bottles *per se*, as thus determined.

(2) As to the contents of the bottles, if such contents are subject to an ad valorem rate of duty or a duty based upon or regulated in any manner by the value thereof, the cost or value of all such charges shall be included in the dutiable value of the contents; but that if the contents are not so subject to duty, then such cost or value shall not be liable to any duty. Reliquidation will be made accordingly. The protests are overruled on all other grounds.

It is further stipulated that upon the decision being transmitted to the collector he reliquidated the entries and—

In making his reliquidation, the collector did not include in the value of the bottles any charges for corking, wiring, capping, labeling, casing, or other items incident to placing the merchandise in condition packed ready for shipment to the United States;

but he added such sums to the value of the contents of the bottles, that is, to the said cherries in maraschino, thereby increasing the dutiable value of the said cherries. He made corresponding deductions from the value of the bottles, thereby decreasing the dutiable value of the bottles. The rate of duty on said cherries in maraschino was not changed in any way by the collector on reliquidation from the rate which had been originally assessed.

\*            \*            \*            \*            \*            \*

(c) In the case of every one of the four entries in question, the total amount of duty found due on reliquidation was less than originally assessed, and refund was accordingly made to the importers in every instance.

It further appears from the record, as stipulated, that this reliquidation was made about the 1st of June, 1908, more than one year after the entries were originally liquidated by the collector. Within 10 days after the reliquidation made by the collector, pursuant to the decision of the Board of General Appraisers, the protests here under consideration were filed. These protests alleged that the cherries are properly dutiable at the rate of 2 cents per pound, or 25 cents per bushel, under paragraph 262, or at the rate of 2 cents per pound under paragraph 264 of the act, and allege—

We also protest against the payment of all duties not legally chargeable upon said importation.

The Board of General Appraisers held these protests untimely; and that inasmuch as the collector in the reliquidation had merely conformed with the mandate of the Board of General Appraisers his action was ministerial and not judicial, and, therefore, not the subject of appeal under the customs administrative act of 1890. That is the question here for decision.

Salient facts to be borne in mind in the consideration of these cases are that no protest was filed against the decision of 1906 of the collector, wherein the rate of duty and the classification of the merchandise was decided by the collector.

Section 14 of the customs administrative act of 1890, as amended, then provided:

SEC. 14. That the *decision* of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, \* \* \* *shall be final and conclusive against all persons interested therein*, unless the owner, importer, consignee, or agent of such merchandise, \* \* \* *shall within ten days after*, but not before such ascertainment and liquidation of duties, \* \* \* or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, *give notice in writing to the collector.* \* \* \*

While this provision provides a method of appeal from the decision of the collector, it, at the same time, provides that the decision of the collector shall be final and conclusive against all persons as to the rate and amount of such duties and as to the propriety of such exactions, costs, and charges, in the absence of such appeal. It makes the decision of the collector as to these matters, and any of them, *res adjudicata*, unless appeal therefrom is taken in the time by the statute allowed.

The collector duly ascertained and decided the rate of duty applicable under the law to the contents of the bottles—the cherries. No appeal was taken from the decision of that matter by the collector. He likewise decided the rate of duty applicable to the bottles. The decision as to that matter was unchallenged. He also decided that certain charges and costs should be assessed against the bottles. The decision as to these matters was duly challenged. Not only was the decision of the collector as to the rate of duty applicable to the contents of the bottles—the cherries—not challenged, but the importer in his protest specifically alleged that certain of the costs and charges had been improperly and illegally laid against the bottles by the collector, and made alternative prayer in his protest that these should be laid against the contents of the bottles. On appeal to the Board of General Appraisers this protest was sustained in all these particulars.

The collector upon receipt of the mandate from the board strictly followed it. In so doing he not alone obeyed the mandate of the board, but he complied with allegations and prayer of the importers made in their protest.

The statute quoted allows an appeal from the *decision* of the collector in the particulars specified.

We think it clear that in carrying out the mandate of the board the collector made no “decision” within section 14 of the customs administrative act. The rate of duty applicable to the cherries having been previously ascertained by him, the mandate of the board prescribed precisely his actions and there was nothing for him to determine or decide. He simply and only applied, or did not apply, in each case as directed by the board the unquestioned invoice value of certain charges in a class of cases, the determination of which class he had previously decided. Had the collector changed his previous decision as to the classification of the cherries, or had he disobeyed the mandate of the board by adding charges to a class of cases not included within the mandate, or extended the same to parts of the invoice not the subject of the decision, he would have gone beyond the letter of the mandate and made *decision* which would be the proper subject of protest, and to question the validity of which these protests would have been timely if sufficient.

While the mandate of the board directs the collector to apply the charges according to classifications of the merchandise, that was a classification previously determined by him and from which no appeal had been taken.

Undoubtedly the classification of the cherries and the rate of duty applicable thereto could have been raised by the importer by protest in the first instance. Having failed to do so within 10 days after liquidation, that matter became *res adjudicata*.



By the protest filed the proper application of the costs and charges was raised, and having been decided by the board, if the importer was dissatisfied he should have appealed. That the proper application of these costs and charges was made an issue by the importer's protest is shown, and was expressly included within the terms of the decision of the board. If the importer was dissatisfied with that decision, unless estopped by his own allegations, he could have had that question decided upon appeal from the decision of the board. In the absence of such appeal the allegations of the protests and matters determined in that decision of the board are likewise *res adjudicata*.

The classification of the contents of the bottles having become final by failure of the importer to appeal, and the rate applicable to the bottles being likewise finally determined, the decision of the collector and the board as to the proper application of the dutiable costs and charges was the only undetermined issue affecting the amount of the duties. The decision of the board, which was based upon other finally determined facts, as set forth in the record, therefore determined the only remaining issuable fact as to the amount of the duties.

Section 14 of the customs administrative act in this particular states that upon appeal to the board "their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein," unless appeal is taken to the courts as provided by section 15 of the same act.

We are of the opinion—

1. That the action of the collector, in obedience to the mandate of the board, having strictly obeyed the same, was, under the circumstances of the case, purely ministerial and did not amount to a "decision" such as is contemplated by section 14 of the customs administrative act of 1890, against which protest would lie.

2. That the failure of appellant to protest in due time against the decision of the collector in 1906, classifying the contents of the bottles for dutiable purposes and applying thereto a *rate* of duty; and the failure of the appellant to appeal from the decision of the board deciding that certain costs and charges should be applied in the manner there held, which was a decision involving and determining the only remaining issuable fact as to the *amount* of the duties and fixing the basis thereof, rendered these decisions in each case *res adjudicata* as to all questions raised by those protests.

As both of these issues are fundamental to and their decision requires review and reversal to sustain this protest, the court is of the opinion appeal does not lie.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

ATHENIA STEEL & WIRE CO. *v.* UNITED STATES (No. 208).<sup>1</sup>

## 1. FLAT PIECES OF STEEL NOT WIRE RODS.

Flat pieces of steel, 3 inches by one-eighth of an inch in thickness, and 30 or more feet in length, and known commercially as "flat rods," are not flat wire rods and were dutiable not as flat wire rods, but under the clause "steel in all forms and shapes not specially provided for," paragraph 135, tariff act of 1897.

## 2. DESIGNATION COVERING ULTIMATE USE.

To bring a manufacturing material within a particular designation in a tariff law that covers one of the ultimate uses of that material, it should be found to be so far advanced by the processes applied to it in fitting it for that ultimate use that either on an examination *per se* its ultimate use is clear or it is found so far advanced that its utility for another possible use has been destroyed.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,  
Abstract 22752 (T. D. 30364).

[Affirmed.]

*Brown & Gerry* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This controversy is over what is conceded to be steel in the form of bands or strips about 3 inches wide, one-eighth of an inch thick, and 30 feet and over in length, imported in coils. The collector at the port of New York classified them for dutiable purposes as "steel in all forms and shapes not specially provided for," under paragraph 135 of the tariff act of 1897. Its pertinent provisions are:

135. Steel ingots; \* \* \* sheets and plates and steel in all forms and shapes not specially provided for in this act. \* \* \*

The appellants here, protestants below, made several claims in their protest. The material and the only one insisted upon at this hearing is laid under paragraph 136 of the act, alleging the merchandise to be "flat wire rods." The provisions of that paragraph are:

136. Wire rods: Rivet, screw, fence, and other iron or steel wire rods, whether round, oval, flat, or square, or in any other shape. \* \* \*

It was the evident purpose of the importers at the hearing before the board to sustain their claim by testimony that the imported merchandise was commercially known in this country as "steel wire rods." The testimony, however, fell far short of supporting that claim; in fact, conclusively showed the contrary, and in their briefs and at the hearing before this court counsel for appellants expressly abandoned that claim. Their case is now based upon the claim that the merchandise is within the common acceptance of the term "flat wire rods" or "wire rods."

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<sup>1</sup> Reported in T. D. 31528 (20 Treas. Dec., 810).

Aside from determining that question in the light of the lexicographic definitions which ordinarily bespeak the import of language as commonly and generally understood, the testimony introduced by both the importers and the Government affords substantial aid and comports precisely with that understanding.

Mr. Ferdinand Wilckes, treasurer of the importing firm, and of experience extending over a number of years in the wire manufacturing and marketing industry, together with other witnesses, agreed as to the manufacturing status of the importations. The gist of the testimony is that the merchandise is produced by heating steel billets about 4 by 4 inches in dimension and rolling them down hot in a rolling mill. As the merchandise thus comes from the rollers it is in the shape and *as here imported*. After importation, and when it is put upon its course to final use, as made by the importing firm, it is again put through rolls and rolled down into longer lengths and a much thinner thickness, the width remaining the same. Thereafter it is put through another machine which slits this comparatively broad band into more narrow widths. There are intermediate heatings as a part of the cold rolling operation. It does not appear, nor is it of controlling importance, whether or not there are incidental annealing processes.

With singular uniformity the witnesses produced by both the importer and the Government, when their testimony is weighed in its fullness, substantially agree that the merchandise as imported is known not as "flat wire rods," but as "flat rods." It is precisely this difference which marks the crux of this case. Flat wire rods are rods of that requisite carbonization and fitness ready to be drawn into wire. Flat rods may be in that condition, but if designated without the qualification, probably have not reached that stage of single usefulness, but may be converted to many other uses as well.

Without reviewing that testimony or quoting any parts thereof, which we would deem here unprofitable, it may be conservatively said within the lines of this record that a vast preponderance of the testimony makes for the proposition that the merchandise is referred to in trade and commerce as "flat rods"; that it is used and usable for a variety of purposes other than that of its ultimate use by these importers, the making of wire, one of which other uses is the making of flat steel springs, as is corroborated by its invoice designation, "Hot rolled *steel for springs*"; that it is not flat wire rods, but is "flat rods," which is the material out of which flat wire rods, as well as a great variety of other kinds of articles, are made.

We do not think this description or understanding, be it a common or commercial understanding, brings the merchandise within the tariff designation invoked. In order to bring any material for manufacturing within a tariff designation which covers one of its ultimate uses it should be so far advanced by the processes applied

thereto in the line of that particular ultimate use that, either from an examination *per se* evidences of its ultimate use are made clear, or so far advanced that its utility in any of its other possible uses shall have been destroyed. This is not the case here.

The same conclusion is indicated by reference to an accepted authority for the definition of "wire rod."

Standard Dictionary:

*Wire rod*.—(1) A billet of iron or steel after it has been passed through the rolling mill and been reduced in size preparatory to drawing. (2) Any metal rod of small diameter.

This merchandise is not in a shape preparatory to drawing. Other processes admittedly must be applied thereto before it is in a shape or condition for drawing into wire. While it has passed to a stage beyond the form of the billet, it has not progressed to the stage which either identifies it for, or makes it useful only for, the purpose of wire making.

A case precisely in point is that of *Worthington v. Robbins* (139 U. S., 337, 340). The merchandise there was "white hard enamel." The importing firm imported and used it solely for the purpose of enameling their watch dials, and claimed it dutiable as "watch materials." It was shown at the trial that the material was also usable in the condition in which imported for enameling the scale columns of thermometers, the faces of steam gauges, and other similar uses.

The Supreme Court said:

By the statement of agreed facts, the article was, when the tariff act applying to it was enacted, known and described in trade as "white hard enamel," and "is used for various purposes, including the making of faces or surfaces of watch dials, scale columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes when a smooth or enameled surface is desired." It thus appears that it is not used exclusively for the making of faces or surfaces of watch dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials, and was in fact so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used.

It appears further that the form or condition of the merchandise as imported affords no evidence or indication of the use to which it is to be applied; that, in the form or condition as imported, it can not be used for any of the purposes mentioned, nor for any purposes whatever of practical use to which it is adapted or ever applied; and that, before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture be applied.

It is apparent, from the facts stated, that the customs officers could not determine from an examination of the article to which of the uses named it was to be applied, or that it was to become the material of a watch. In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported. In order to be dutiable as "watch materials," the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches.

The article in question was, to all intents and purposes, raw material. If it were to be classed as "watch materials," it would follow that any metal which could ultimately be used, and was ultimately used, in the manufacture of a watch, but could be used for other purposes also, would be dutiable as "watch materials." In order to be "watch materials," the article must in itself bear marks of its special adaptation for use in making watches. The fact that the article in question was used in the manufacture of watches has no relation to the condition of the article as imported, but to what afterwards the importer did with it.

Since the appellants abandoned the claim that the merchandise is commercially known as "wire rods" or "flat wire rods" and rely upon the descriptive force of these words as used in paragraph 136, we think their claim without merit.

It is difficult to reconcile merchandise commonly contemplated by the mind untrained in any of the commercial distinctions of the iron and steel industry, on mention of the term "wire rods" or "flat wire rods," anything in any wise like this importation, which is a flat piece of steel 3 inches wide, one-eighth of an inch thick, and 30 feet or more in length.

*Affirmed.*

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and BARBER, Judges, concur.

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#### HYGEIA ANTISEPTIC TOOTHPICK CO. v. UNITED STATES (No. 404).<sup>1</sup>

##### "HYGEIA" PAPER USED FOR WRAPPING STRAWS AND TOOTHPICKS.

There is a presumption in favor of a collector's classification and assessment which must be overcome by proof, and it being possible to show by chemical analysis alone that the importation of hygeia paper contained less magnesia than cigarette paper contains, and the results of no such analysis being shown, and it appearing the dominant use of paper such as this in question is for the manufacture of cigarettes, the assessment of the collector must stand, as proper, under paragraph 459, tariff act of 1897.

United States Court of Customs Appeals, April 17, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23519 (T. D. 30710), Abstract 23642 (T. D. 30754).

[Affirmed.]

*Comstock & Washburn* (Albert H. Washburn and J. Stuart Tompkins of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Edwin R. Wakefield on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise in question consists of certain paper, which was assessed for duty at 60 per cent ad valorem under the provisions

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<sup>1</sup> Reported in T. D. 31529 (20 Treas. Dec., 813).

of paragraph 459 of the tariff act of 1897 as cigarette paper. It is claimed by the appellant to be dutiable at 25 per cent ad valorem under paragraph 402 of that act as paper not specially provided for.

The Board of General Appraisers sustained the collector's assessment. Its finding, in substance, is that the paper is like that in another case before it, in which case the paper was held dutiable as cigarette paper. This form of finding affords but little information to this court.

The appellant's contention is that the paper is not in fact cigarette paper in its composition, because it contains less magnesia than does such paper.

It appears from the evidence that there is no difference between the physical appearances and characteristics of this paper and what is concededly a cigarette paper except that the appellant's trade-mark, "Hygeia," is watermarked thereon, that when so marked it is made especially for appellant and obtained by it from a cigarette-paper distributing agency in Vienna, Austria; that it is imported on reels or bobbins in the same manner as most cigarette paper, and that the only way to determine whether or not it contains less magnesia than cigarette paper is by making a comparative chemical analysis, which has not been done.

It appears that paper having apparently the same physical appearances as to quality, color, weight, and width, but not having the watermark "Hygeia" thereon, is commonly used for making cigarettes. It does not appear that the paper involved in this case is not suitable for that purpose, but it is claimed that because it bears appellant's trade-mark it can not be so used.

There is no evidence as to the proportion or amount of magnesia contained by either this or cigarette paper or that all cigarette papers contain the same amount thereof. The learned counsel for appellant assumes that there is evidence of record that the paper at bar contains less magnesia than cigarette paper, and upon that assumed fact his claim is really based, although he urges in connection therewith what appears without dispute—namely, that the only use made by appellant of this paper is to wrap therein antiseptic quill toothpicks and hygienic julep straws. The evidence relied upon to show that the paper contains less magnesia than cigarette paper is in substance that several years ago appellant bought on the market cigarette paper for wrapping these toothpicks and straws. It was desired to close the wrapper by corrugating the same with machinery without the use of an adhesive; but the cigarette paper then obtained occasioned trouble, because the wrappers opened at the ends where the corrugating processes had been applied.

In this connection, Mr. Herz, who said he was the proprietor of the appellant, testified:

Q. Do you know whether or not this paper is made the same as cigarette paper, Mr. Herz?—A. A change has been made in the manufacture of it to suit our purposes. As I understood when I was abroad and spoke to the manufacturer, he said that the cigarette paper contained an excessive amount of magnesia and that was the reason why it would not corrugate and close; so they made this paper for our purposes with less magnesia, as far as I understand.

Cross-examination:

Q. Do you know, Mr. Herz, what process this is put through from your own knowledge?—A. I could not tell you; I don't know.

Q. All you know is what the manufacturer told you about it?—A. I went to the manufacturer and told him what we need, and he said that he would look after that and put in less magnesia.

It does not appear that appellant or its agents then knew or have since learned, except as already stated, the reason why the cigarette paper proved unsatisfactory in the respect mentioned.

So far as appears, appellant has had no further trouble of the kind mentioned since this interview with the manufacturer, and the plain inference from the evidence is that paper like the importation in question is adapted to be corrugated and reasonably thereafterwards to keep its shape. Except as appears from the quoted evidence and the facts hereinbefore set forth, there is no evidence tending to show either that the cigarette paper first used contained too much magnesia or that the manufacturer, after Mr. Herz called upon him, used less magnesia in this paper than was then used in making cigarette paper or is now used therein, or that cigarette paper now in use contains the same, a greater, or a less amount of magnesia than is contained in the importation here.

There is a presumption in favor of the collector's classification and assessment which must be overcome by proof.

We think from the foregoing quoted evidence of Mr. Herz, considered in connection with the other facts stated, it clearly appears that all he knows upon the question of whether or not this paper contains less magnesia than cigarette paper is based upon what he has been told. This is hearsay evidence, and not proof sufficient to overcome the presumption of the correctness that attaches to the collector's action. The fact that this paper corrugates sufficiently to meet appellant's requirements and cigarette paper does not, if such be now the case, is of no avail, because it does not appear that it is because the paper contains less magnesia than cigarette paper, except that Mr. Herz says he has been told so.

We think it is obvious that appellant's trade-mark on this paper does not of itself preclude its classification as cigarette paper. The appellant can use it for the manufacture of cigarettes, or may license others to do so. It is, however, argued that the fact that it is pre-

pared for and devoted to a dissimilar use should preclude such a classification.

Paragraph 459 relates to "cigarette paper in all forms." This paper has been classified as "cigarette paper," and no evidence is found to overcome the resulting presumption that it is such; indeed, we think the evidence tends to support the classification. Doubtless cigarette paper is sometimes devoted to purposes other than the making of cigarettes, but we think when once it appears that an article is cigarette paper in fact, its classification can not be changed by devoting it to such a use as appears in this case; it is still cigarette paper. If the question of use, however, were of consequence, the rule is well settled that the chief or predominant use to which an article is applied determines its classification, although it may be exceptionally and practically used for other purposes. *Magone v. Wiederer* (159 U. S., 555).

It appears of record that the amount of this paper used by appellant is but a very small part of the whole amount of cigarette paper imported to and used in the United States in the manufacture of cigarettes.

The judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

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DOWNING v. UNITED STATES (No. 431).<sup>1</sup>

PEARS' UNSCENTED SOAP A FANCY TOILET SOAP.

Where there are irreconcilable differences in the testimony as to the use of the term "fancy soap" in commerce, it can not be said to have a commercial meaning that is definite, uniform, and general; but since the importation in question consists of cakes of soap, oval in form, translucent, attractive in appearance, agreeable in odor, and appealing to a fastidious taste, it is properly to be regarded as a fancy toilet soap, and was dutiable as such under paragraph 69, tariff act of 1897, and this regardless of whether or not it was perfumed.

United States Court of Customs Appeals, April 17, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7059 (T. D. 30761).

[Affirmed.]

*Curie, Smith & Maxwell* (W. Wickham Smith of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

On January 11, 1910, the appellants imported from England a consignment of Pears' unscented soap. The duty upon this importation

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<sup>1</sup> Reported in T. D. 81530 (20 Treas. Dec., 816).



was prescribed by paragraph 69 of the act of 1909, which reads as follows:

69. Castile soap, one and one-fourth cents per pound; medicinal or medicated soaps, twenty cents per pound; fancy or perfumed toilet soaps, fifty per centum ad valorem; all other soaps not specially provided for in this section, twenty per centum ad valorem.

The collector held the soap to be a "fancy toilet soap," and therefore dutiable at 50 per cent ad valorem. The appellants protested against this assessment and contended that the soap was not a "fancy soap," and that neither was it a "perfumed toilet soap." They therefore maintained that it was dutiable at only 20 per cent ad valorem as a soap "not specially provided for" in the section.

The protest of appellants was heard upon evidence by the Board of General Appraisers, and the decision of the collector was affirmed by the Board. The appellants now present the record containing all the testimony, and also the exhibits, and pray for a reversal of these decisions.

It is conceded that Pears' unscented soap is a toilet soap. The question is whether it is also a fancy or perfumed toilet soap within the meaning of paragraph 69.

An examination of the record discloses the fact that both appellants and appellee undertook to prove to the board that the term "fancy" as it occurs in the paragraph was used not in its ordinary application, but rather as a trade term or commercial designation. The parties differed of course as to the signification which the trade had given to the term as its technical definition.

The appellants examined a number of expert witnesses upon this question. Each witness so examined by appellants testified specifically that Pears' unscented soap was not a fancy soap within the meaning of the term as established by the trade. The witnesses differed somewhat from one another as to the exact trade meaning of the term. However, with substantial unanimity they agreed that no soap would be called fancy by the trade unless it was wrapped in an ornamental wrapper and packed with only a few cakes in a box. The term fancy, according to these witnesses, had no application to the soap itself, but only to the manner in which it was wrapped and boxed. One exception to this use of the term was explained: If the soap had been cast into some fantastic form, such as a fruit or flower, or some other unusual figure, it would be called a fancy soap regardless of its quality. The appellants' witnesses agreed, however, that the quality and character of a soap would never entitle it to the trade designation "fancy," and that this term related wholly and entirely to its shape, wrapping and packing.

The Government also called a large number of witnesses upon this branch of the case. Each of these witnesses in turn testified specific-

ally that Pears' unscented soap was a fancy soap within the meaning fixed for that term by trade usage. The witnesses, in fact, agreed that all toilet soaps were called fancy soaps by the trade; they all denied specifically that the shape, wrapping or packing determined whether the soap was fancy or not. They maintained that the character of the soap itself alone determined whether it was a fancy soap or not, and that the name was generally given by the trade to all real toilet soaps. An uncertain borderland might be found in the case of such laundry soaps as had been so improved as to be sometimes used for toilet purposes, but such soaps as were distinctively toilet soaps were all, according to the Government's witnesses, fancy soaps.

The Government does not rest this branch of its case wholly upon this attempted proof, for it also contends that the appellants have failed to sustain their alleged definition of the term, and that if the word be given its common and ordinary signification it would nevertheless include such soap as this.

The first question presented by the record is whether the appellants have proven the alleged commercial definition of the word "fancy," upon which their case is so largely predicated.

The board found against this claim on the evidence. And a reading of the record and a comparison of it, part with part, leads to the conclusion that the tendered definition has not been sufficiently sustained by the evidence to entitle it to acceptance as a trade designation.

In construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the date of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal. *Maddock v. Magone* (152 U. S., 371).

The testimony introduced by the appellants to sustain the alleged usage is met by the Government with a larger volume of contradicting testimony from witnesses of apparently equal intelligence, equal opportunities of knowledge, and equal good faith. And while the testimony for the appellants seems on its surface to fully support their contention, if uncontradicted, there is nevertheless an undertone throughout it all which leaves one quite uncertain as to its convincing effect. Taking the testimony for the appellants alone, it can hardly be said to show that the alleged usage was well established, or was definite, uniform, and general.

The following questions and answers are taken from the cross-examination of some of the witnesses who were called by appellants. It is generally misleading to select detached excerpts from the tes-

timony of a witness and present them apart from their context; nevertheless these will not unfairly explain the meaning of the foregoing statement. These witnesses, it will be remembered, had all testified in chief in exact support of appellants' claim as to the trade meaning of "fancy."

Samuel A. Foot (p. 17):

Q. You have stated that the term "fancy soaps" is a well-understood trade expression as embracing a well-known class of goods?—A. Yes.

Q. Now, when do you use the word "fancy," if you use it at all?—A. I very seldom use it.

Q. Very seldom use it?—A. Yes, sir.

Q. Is it used in price lists at all as describing certain soaps?—A. More in cheap domestic goods. We will say goods that are known as five and ten cent sellers, than as imported goods.

\* \* \* \* \*

(Page 18:)

Q. You issue price lists, don't you—current lists?—A. Yes.

Q. And in those lists do you classify soaps with regard to their being perfumed or unscented or fancy?—A. Not in the list that we issue.

William K. Wardner (p. 26):

Q. Is the word "fancy" used in any way in business transactions, price current lists?—A. Except as to the packing, I have never seen it used in catalogues that I knew of. I would not say that it is not, but I don't recall it.

Q. Do you ever use it in placing orders or receiving orders?—A. No, no.

Q. Ever use it in correspondence?—A. No, sir.

Charles E. Cornell (p. 36):

Q. They use that term in their orders, do they?—A. Not very often; occasionally.

Q. Do you use it in pamphlets, circulars, or price lists?—A. Very rarely. It would be under the head of toilet soaps, classified so.

Albert J. Cramp (pp. 44, 45, 46, 47):

Q. Is the expression "fancy soaps" used at all in your catalogues?—A. No, sir.

Q. Prices current?—A. That is not in our catalogues.

Q. Do the people from whom you buy use the expression in their catalogues?—A. I don't think so.

Q. So that there are no soaps commonly listed under the expression "fancy soaps" as a class?—A. That has not come before my notice.

\* \* \* \* \*

Q. What is it, in your judgment, speaking now as a man experienced in the trade, that must necessarily be in a soap or connected with it to make it a fancy soap?—A. Well, the ingredients, for instance—the ingredients of a soap.

Q. Its composition?—A. Its composition.

Q. Will its composition control as against every other feature?—A. I think so.

\* \* \* \* \*

Q. Mr. Cramp, you testified in the answer to, I think, the first question of the counsel for the Government here that the question whether a soap was a fancy soap was determined by the character of the wrapper in which it was wrapped, and you have since testified, in answer to the question of the general appraiser, that the question of whether a soap was a fancy soap was determined either wholly or largely by its ingredients. Now, will you tell me which of those answers you wish to adhere to, or whether both of them, or whether you wish to withdraw one of them?—A. I would state that a fancy soap is judged principally by the wrapper that covers it.

Q. Well, now you say "principally." Is there something else that enters into the question of whether it is a fancy soap or not?—A. That finally determines it, I think.

Q. What; the wrapper?—A. The wrapper.

Alfred Kennedy (p. 50):

Q. Did the term "fancy soaps" have a well recognized and understood meaning as a trade term in the soap trade in 1909, August 5?—A. Not so much; no, sir.

E. A. Smith (p. 60):

Q. Is the word "plain" or "fancy" used in orders for soap?—A. No.

Q. Used in catalogues, price lists?—A. Well, that I could not answer. Not that I have ever seen.

Q. I mean, of course, those that came to you in your business.—A. No.

W. J. Quinby (p. 70):

Q. Your customers don't say fancy soap?—A. They say toilet soaps and generally say what price they want.

Q. Are those terms interchangeable, fancy and toilet?—A. It is not printed on catalogues or anything of that kind. We call all our soaps done up three cakes in a box fancy soaps.

Q. Is every toilet soap a fancy soap?—A. That I could not say.

As has been stated, each party called a large number of expert witnesses concerning the trade meaning of the words "fancy soap." The very fact that there is such hopeless confusion and irreconcilable difference between them argues against the existence of a commercial definition which was definite, uniform, and general.

It is easy to see how some confusion might arise on this subject. Ordinarily superior soaps would be wrapped in ornamental wrappers and packed with but few cakes in a box. This practice would aid in selling the soap at a price consistent with its quality. It might, therefore, come to be generally understood that a fine wrapper would indicate a fine cake of soap in it. In that sense a fancy wrapper might come to designate the character of the soap by acting as an assurance of its quality. The soap, however, and not the wrapper, would yet be the real determining factor. And the witnesses for appellants seem to be going too far when they say that the trade had finally come to look to the wrapper alone, and not at all to the character of the soap within, in their application of the term "fancy soaps." That is, they seem to be going too far when tested by the probability of their testimony, by their own explanations upon cross-examination, and by the opposing evidence of the large number of witnesses who directly contradict them.

All the expert witnesses seem from the record to be merchants and manufacturers of large experience, and from different parts of the country, and appear to be equally intelligent and sincere.

It being decided, then, that the term "fancy" had no such trade meaning as appellants contend, the next question is whether in its common and ordinary signification the term includes such soap as that in question. The board held that it did.

From the record and from the exhibits it appears that this soap is wrapped for the market in plain paper covers and is packed in ordinary

boxes, sometimes with many cakes in a box. But in quality the soap itself is evidently a superfine article. The cakes are oval in form, with concave sides, and are attractive in appearance. They are convenient in size for toilet use. They are handsomely colored, the cakes being also translucent. The soap is not merely neutral in respect to odor, but instead possesses a very delicate and pleasing fragrance. It is palpably an article which is not merely useful as a cleansing agency in the bath, but in addition to this quality of usefulness it possesses other qualities designed to make it pleasing to the senses. Because of the materials composing it, or the process of manufacture, or both, it is an article which appeals to the fancy; it is characterized by refinement of finish; it is ornamental in qualities rather than plain; it gratifies a refined and cultivated taste; and satisfies the demands of the fastidious. This is an added quality, and is a step in advance of merely common practical usefulness. The record shows that these qualities result, in part at least, from processes in manufacture which are not essential to the making of a toilet soap useful for mere cleansing purposes. Alcohol is used for the sole purpose of producing the distinctive clearness of the soap which adds so much to its appearance. Other ingredients are used for the sole purpose of giving the soap its fragrance.

In common parlance such a soap would ordinarily be called a fancy soap, regardless of its wrapping and packing. And there seems to be no reason why this meaning should not be given the word as used in paragraph 69. The soap was therefore dutiable at 50 per cent ad valorem as a fancy soap. Such a conclusion does not imply that the term in question is not broad enough to include also such other soaps as are made especially attractive by reason of their unusual forms; nor does it imply that all toilet soaps would necessarily be classified as fancy soaps.

In view of this conclusion, the question whether the soap is also a perfumed toilet soap is not important in this case. There was a careful examination made into this question by the parties, as appears by the record. A great deal of conflicting testimony was submitted to the board upon that issue. It may be noted, however, that the original assessment by the collector of 50 per cent ad valorem, following T. D. 30113, was placed upon the sole ground that the soap was a fancy toilet soap and not upon the ground that it was a perfumed one. The Board of General Appraisers did not base their decision upon the theory that the soap was a perfumed soap, nor is this decision predicated upon such a finding.

The decision of the board is *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

MYERS v. UNITED STATES (No. 454).<sup>1</sup>

## 1. MINERALS—NEW NAME FOR PROCESS PRODUCT NOT ESSENTIAL.

To exclude minerals from the provisions of paragraph 614 covering "minerals crude and not advanced in value or condition by refining, grinding, or other process of manufacture," it is not essential that the product of such process be given a new name.

## 2. CORUNDUM ORE CONCENTRATES, BY SIMILITUDE, EMERY.

Corundum ore obtained from rocks that have been quarried and crushed fine enough to be passed through the meshes of sieves and, after being washed, graded according to size, can not be regarded as either crude or manufactured sand, or as a crude mineral, but must be taken rather to be a mineral extracted by process from a crude mass of matter; it differs from emery only in being substantially free from impurities, and so was dutiable by similitude as emery, ground, under paragraph 419, tariff act of 1897.—*Myers v. United States* (163 Fed. Rep., 53), *Roesman v. United States* (T. D. 31321); *Hartranft v. Wiegman* (121 U. S., 609) distinguished.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court of Appeals, New York (T. D. 30470; 178 Fed. Rep., 462).

[Affirmed.]

*Walden & Webster* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this case was invoiced as corundum ore concentrates. It is in fact a product of corundum, crushed and ground to different degrees of fineness, and divided into grades more or less uniform in size. It was assessed for duty at the rate of 1 cent per pound as having a similitude to emery, ground, provided for by paragraph 419 of the tariff act of 1897, the pertinent provision of which reads as follows:

Emery grains, and emery manufactured, ground, pulverized, or refined, one cent per pound. \* \* \*

The importer claims first that the merchandise was subject to free entry under paragraph 671 and alternatively under paragraph 614 of the tariff act of 1897. The two paragraphs read as follows:

671. Stone and sand: Burrstone in blocks, rough or unmanufactured; cliff stone, unmanufactured; rotten stone, tripoli, and sand, crude or manufactured, not otherwise provided for in this act.

614. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act.

The first question presented is whether the article is sand within the meaning of paragraph 671. It is certainly not crude sand, as will

<sup>1</sup> Reported in T. D. 31531 (20 Treas. Dec., 822).

be seen by the description of the process of manufacture. Is it manufactured sand within the meaning of section 671?

The material occurs in nature in the form of a rock which is quarried out of the earth and is found, according to the testimony of the importer's witnesses, in various kinds of rocks, and the process of manufacture is described by the witness as follows:

After this rock is taken from the quarry we take it to the mill and it is crushed with a large-jawed crusher. It is crushed until we crush it fine enough to pass through the various sieves or meshes of the sieve as shown in Exhibit 1. \* \* \*

He also testified that water is used to wash away the impurities, and it is then graded according to its size, placed in bags, and shipped.

The testimony shows that the rock from which this material is made is sometimes called "ore," and would seem from the testimony to be of little value when lying in the earth. The finished product represented by the present importation is worth 5 cents per pound or \$100 a ton in Canada where made. It will be noted that the word "sand" is used in the same paragraph with "burrstone," "cliff stone," "rotten stone," and "tripoli," all of which are cheap materials and mainly composed of siliceous rock.

There are many definitions of the word "sand" which would cover the importation in question. But it often is given a more restricted meaning, as for instance, in Webster's Dictionary, sand is defined as—

Fine particles of stone, especially of siliceous stone, but not reduced to powder or dust; comminuted stone in the form of loose grains, which are not coherent when wet.

In the New English Dictionary, "sand" is defined as—

A material consisting of comminuted fragments and water-worn particles of rocks (mainly siliceous) finer than those of which gravel is composed.

As before stated, it is perfectly clear that this is not crude sand. Nor do we think it can be considered manufactured sand within the meaning of this paragraph. Undoubtedly sandstone, ground or crushed so as to separate the particles into loose grains, might be called manufactured sand. But something more than this is done to this material. It is not only crushed, but a process of separation of the various ingredients which go to make up the material of which it was originally composed occurs. By the testimony of witnesses as to conditions in the North Carolina mines, only one part in ten of the original material is recovered as corundum. This is not so much a process of manufacture of sand as of extraction of a material from a crude mass, and partakes more of the character of recovering a mineral than manufacturing sand within the ordinary meaning of that term.

The Circuit Court of Appeals had the identical question before it in which the same importer was a party, and the decision is reported in

the case of *Myers v. United States* (163 Fed. Rep., 53). It was said by the court:

Definitions of the word "sand" may be found sufficiently broad to include any mineral when reduced to fine particles. Other definitions limit the term to fine particles of stone, and in ordinary use it is confined to fine particles of siliceous stone, common sand consisting almost entirely of silica. The decision of this case, however, does not require us to accurately define the word "sand." We are rather called upon to say what it does not include, as used in the tariff act, than what it does include. Obviously the word as so employed does not include gold dust or any of the precious metals when reduced to fine particles. Almost equally clear is it that the baser metals—*e. g.*, iron or zinc—when ground would not commercially be called sand; and we think it also follows that the term is inapplicable to any metalliferous mineral, although it be in comminuted fragments.

We fully agree with the conclusion of the Circuit Court of Appeals in the case cited, and hold that this importation is not sand, either crude or manufactured, within the meaning of the paragraph in question.

It remains to be determined whether it is to be considered as "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture."

It is to be noted that this material is advanced from what is described by the importer's witness as conglomerate ore to a finished product worth 5 cents per pound. It is crushed and washed. It is in fact a finished product for the uses to which it is adapted, and we think it comes within the case of *United States v. Graser-Rothe* (164 Fed. Rep., 205), where this same section of the statute was construed, and it was held that the process of crushing waste marble and fitting it for use and giving it the name of granito or terrazzo constituted a manufacture, and that it was no longer crude mineral. The same question was presented to this court in *Rossman v. United States* (T. D. 31321), in which case we followed the holding in *United States v. Graser-Rothe*, *supra*, and held granito to be advanced in value by crushing, and it was there said:

In the case at bar the importation has been substantially increased in value. It has been subjected to labor and mechanical treatment which has largely contributed to its increased value. It has taken a new and distinctive name which does not appear to be related to the original product and is devoted to a use to which it seems waste marble has not formerly been applied. The statute applicable seems to imply that grinding or refining are within its meaning deemed to be a process of manufacture; otherwise no force can be given to the word "other" in the paragraph.

If grinding be a process of manufacture, we see no good reason for saying that crushing is not equally so. The operations are similar, the main difference being that in grinding the substance treated is more finely pulverized than is ordinarily understood to result from the crushing process. It is rather a difference of degree than otherwise.

It is true that the product of this process still retains the name of orundum. It perhaps might be more appropriately called corundum sand, as it is not corundum ore as it appears in nature. But



be that as it may, we can not conceive that the name by which the article is known should be held controlling in view of the language of this paragraph. To bring the mineral within the paragraph, it must be crude—that is, not advanced in value or condition by refining, grinding, or other process of manufacture. Clearly a process of manufacture so similar to grinding as is crushing should be held to be within the general language “other process of manufacture,” used in this paragraph and in close relation to the word “grinding.” It is quite different in its operation and results from the mere breaking of ore or ore-bearing rocks for the purpose of excluding from the mass barren rock and reducing the cost of transportation, as was the case in *Cockerill Zinc Company v. United States* (T. D. 27891). The present importation is completely manufactured and fitted for use.

The case is clearly distinguishable from *Hartranft v. Wiegmann* (121 U. S., 609). The language there construed by the Supreme Court was, “shells of every description not manufactured.” It appeared that the shells had been prepared by cleaning off the outer layer by acid, then grinding off the second layer by an emery wheel, and that the object of these manipulations was for the purpose of ornamentation, and the shells were sold as ornaments. The court said:

The application of labor to an article either by hand or by mechanism does not make an article necessarily a manufactured article within the meaning of that term as used in the tariff laws.

and held that the importations were not manufactured; that they were still shells; and said:

They had not been manufactured into a new and different article having a distinctive name, character, or use from that of a shell.

But the language of the paragraph under consideration in this case is quite different from that there construed. “Advanced in value or condition by refining or grinding, or by other process of manufacture” is open to quite a different construction from that which can be given the bare word “manufactured.”

The case *In re Gardner* (72 Fed. Rep., 492), cited by us in the *Rossman* case, *supra*, with approval, is instructive. The court there had under consideration a paragraph which provided that “bones, crude, or not burned, calcined, ground, steamed, or otherwise manufactured” should be entitled to free entry. It appeared in that case that the bones had been crushed and screened. The court held that the word “manufactured” seemed to be given a definition by the paragraph itself different from the definition in *Hartranft v. Wiegmann*, *supra*. So we think in the present case that the words “otherwise manufactured” should be read in connection with what precedes them in the same paragraph; and, so construed, we think they include such a process of manufacture as that here employed. An article quite different

from the crude ore is the result of this process, and we think the product can not be called a crude mineral within the meaning of paragraph 614.

It only remains to consider whether the importation is dutiable by similitude under paragraph 419 of the tariff act of 1897, which provides a duty of 1 cent per pound on "emery grains, and emery manufactured, ground, pulverized, or refined."

Corundum is different from emery only in that it is substantially free from any impurities. Emery ore is corundum ore, containing magnetic iron. Both ores when used in the arts are ground into fine particles and used for grinding. While corundum and emery are commercially distinct articles, they are both used for the same identical purpose. It is difficult to conceive of a case in which the application of the similitude clause would be more imperative.

The decision of the Board of General Appraisers, which held this article dutiable by similitude with emery, is *affirmed*.

SMITH, BARBER, DE VRIES, and MARTIN, Judges, concur.

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AUSTIN *v.* UNITED STATES (No. 462).<sup>1</sup>

BUILDING OR MONUMENTAL STONES, DRESSED OR POLISHED. •

Pieces of granite, ornamented and polished to size, scale, and design, and ready after being cemented or leaded together to be set up, are building or monumental stones and were dutiable as such under paragraph 118, tariff act of 1897.—Austin, Baldwin & Co. *v.* United States (144 Fed. Rep., 702), and Murphy *v.* United States (162 Fed. Rep., 871); Vantine & Co. *v.* United States (159 Fed. Rep., 289) distinguished.

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 14687 (T. D. 27999), Abstract 14832 (T. D. 28036).

[Affirmed.]

Walden & Webster for appellants.

D. Frank Lloyd, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers holding the importation in question dutiable under paragraph 118 of the tariff act of 1897. The protest claims the articles dutiable under paragraph 97 and alternatively under section 6. The four paragraphs in question read as follows:

117. Freestone, granite, sandstone, limestone, and other building or monumental stone, except marble and onyx, unmanufactured or undressed, not specially provided for in this act, twelve cents per cubic foot.

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<sup>1</sup> Reported in T. D. 31532 (20 Treas. Dec., 826).

118. Freestone, granite, sandstone, limestone, and other building or monumental stone, except marble and onyx, not specially provided for in this act, hewn, dressed, or polished, fifty per centum ad valorem.

97. Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem.

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

The importation consists of granite, prepared in pursuance of designs and specifications for monuments, and consists of pieces of granite, such as die, base, and cap. These pieces were dressed, ornamented, and polished abroad to size, scale, and design, and were imported in that shape. It appears from the testimony that after being thus imported the monuments are ready to be set up, the several pieces being cemented or leaded together.

The real question is whether paragraph 118 is a more specific enumeration of this importation than section 6, providing a tax on unenumerated manufactured articles, or paragraph 97, imposing a tax upon articles in chief value of earthy or mineral substances.

The two paragraphs, 117 and 118, should be read together. Paragraph 117 provides for monumental stone unmanufactured or undressed. Paragraph 118, immediately following, provides for monumental stone hewn, dressed, or polished, and fixes a tax of 50 per centum ad valorem as against a tax for the unmanufactured or undressed at 12 cents per cubic foot. The intent to cover the advanced or manufactured article by paragraph 118 we think is manifest. It is true that in one sense these importations nearly approach a completed article, in fact are ready for use with the slight exception of leading or cementing. But we can not escape the conviction that they come more properly under paragraph 118 than under section 6. Most clearly they are building stone, and they are hewn, dressed, and polished, and are within the language of paragraph 118. There is nothing in the language of the act, taken as a whole, which leads us to the conclusion that the intent of Congress was to exclude articles so far advanced as are these from the provisions of paragraph 118.

The question is not new. It was first presented to the Board of General Appraisers in *Austin, Baldwin & Co. v. United States* (144 Fed. Rep., 702), opinion by General Appraiser McClelland. It was there held that monuments in sections consisting of pieces of dressed granite to be assembled and erected as monuments without further manipulation were dutiable under paragraph 118. This case was taken by appeal to the district court and there affirmed, *ibid.* On appeal to the court of appeals, the decision of Hazel, district judge, was affirmed without opinion.

It is suggested in the brief of counsel that the force of this opinion is lessened by the fact that in the case cited the protest did not make the claim that the importation was dutiable under section 6. But an answer to this contention is found in the case of *Murphy v. United States* (162 Fed. Rep., 871), which was heard by Justice Moody and Circuit Judges Dallas, Gray, and Buffington. Upon full consideration the case of *Baldwin v. United States*, *supra*, was followed. The court held that paragraphs 117 and 118 were evidently meant to cover the general subject of building and monumental stone. The opinion proceeds:

In substance, paragraph 117 provided for importation thereof in crude state, described them as "unmanufactured or undressed," and levies a tax of 12 cents per cubic foot; while paragraph 118 provides that when such material was "hewn, dressed, or polished"—that is, when the value had been increased from the crude to a "hewn, dressed, or polished" state—they were taxed at 50 per cent ad valorem. Now, it is clear that these articles which were finished parts of a monument, each dressed to scale and ornamented and polished to design, were aptly described as "granite \* \* \* dressed or polished." They are of the general class of articles, viz, monumental stone, which paragraph 118 covered, and are therein more specifically designated as "granite or monumental stone, dressed or polished," than in the broader generic language of section 6 as "articles manufactured in whole or in part."

We agree fully with the views expressed in this opinion.

The importers contend that the later case of *Vantine & Co. v. United States*, decided at circuit by Martin, district judge (159 Fed. Rep., 289), and on appeal affirmed by the Circuit Court of Appeals of the Second Circuit (166 Fed. Rep., 751), supports their contention and is in conflict with the cases cited. That case must be considered as authority only for the precise point ruled on. The merchandise imported consisted of Japanese lanterns formerly used in Japan as ornamental garden lanterns and brought into this country as curios. It was held that they had passed out of the class of building and monumental stone, were not covered by any paragraph, and therefore should be classified under section 6 at 20 per cent as unenumerated manufactured articles.

The *Vantine* case is clearly distinguishable from the present. paragraph 118 relates only to monumental or building stone. When such stone, although it formerly may have been monumental or building stone, is cut into the form of an article like a stone lantern, used as an ornamental garden lantern, it is no longer suitable for building purposes or for monumental stone.

There is none of the present importation which is not suitable for monumental stone, and in fact dedicated to that use. It comes literally within the terms of paragraph 118, whereas the changed condition of the article in the *Vantine* case excludes it from the terms of paragraph 118.

The decision of the Board of General Appraisers, following the case of *Murphy v. United States*, *supra*, is *affirmed*.

SMITH, BARBER, DE VRIES, and MARTIN, Judges, concur.

STONE & DOWNER CO. v. UNITED STATES (No. 483).<sup>1</sup>

## 1. "FIT ONLY FOR SUCH USE" DEFINED.

The phrase "fit only for such use" means fit in a commercial sense; but whether an article must be held fit for a certain use, if when blended with other articles it becomes so fit, is a question now reserved.

## 2. DRESSING OIL DISTILLED FROM GREASE.

A dressing oil distilled from grease or degreas being found by the Board of General Appraisers to be fit for other purposes than for dressing or stuffing leather, the evidence being conflicting, this finding will not be disturbed, and the importation was dutiable under paragraph 3, tariff act of 1897.—McKerrow Co., Abstract 6179 (T. D. 26312).

United States Court of Customs Appeals, April 17, 1911.

TRANSFERRED from United States Circuit Court, District of Massachusetts, Abstract 21485 (T. D. 29877).

[Affirmed.]

*Searle & Pillsbury* (Wm. E. Waterhouse of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation which is the subject of the present controversy consists of oil known as a dressing oil distilled from wool grease or degreas, the principal use of which is for dressing or stuffing leather. It was assessed for duty under paragraph 3 of the act of 1897, which reads:

Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

It is claimed to be free of duty as an oil commonly used in stuffing leather under paragraph 568 of said act, which reads:

Grease and oils (except fish oils), such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specially provided for.

It is further claimed alternatively to be dutiable at one-half cent a pound as wool grease under paragraph 279 of said act, which reads:

Tallow, three-fourths of one cent per pound; wool grease, including that known commercially as degreas or brown wool grease, one-half of one cent per pound.

As the record shows beyond question that the oil in question is a distilled oil and advanced beyond ordinary wool grease, we think the claim under paragraph 279 of the act is not entitled to prevail. Indeed, it appears not to be insisted upon by counsel in their brief.

The principal question is whether this oil, being chiefly used for dressing and stuffing leather, is here shown to be fit only for such

<sup>1</sup> Reported in T. D. 31533 (20 Treas. Dec., 829).

use, and this is a question of fact. Unquestionably the term "fit only for such use" means fit in the commercial sense. *Jessop & Moore Paper Co. v. Cooper* (46 Fed. Rep., 186); *White v. United States* (69 Fed. Rep., 93); and *United States v. Colby & Co.* (153 Fed. Rep., 883).

We do not determine either in this case that it is sufficient to justify holding that an article is fit for a certain use to find that it may, by blending with other articles, become so fit. We neither affirm nor negative that proposition, as we do not deem it necessary to do so in order to reach a conclusion in the present case.

The evidence in this case is conflicting, but after a full hearing the Board of General Appraisers found that the oil involved is in all particulars similar to that which is the subject of the board's abstract decision 6179 (T. D. 26312). In that case it was found that the oil involved was suited for wool dressing, and also fit to be used as a lubricating oil, and it was held therefore to be dutiable under paragraph 3, above quoted.

It is urged in the brief of counsel for appellant that this result was reached by confusing this oil with that in the McKerrow case (T. D. 26312), and it is pointed out that the attempt on the part of the Government to show by direct proof that this oil was of the same character as that involved in that case failed, as the Government failed to produce samples of the oil in the McKerrow case for comparison with that here involved.

We think that counsel has misapprehended the attitude of the Board of General Appraisers. There is nothing to indicate that the board in determining this case considered the evidence which was stricken from the record. All that the opinion in the present case does indicate is that upon a consideration of the testimony of the chemists and dealers in oil of the character submitted in this case the board found that it was substantially the same in character as the oil described in the McKerrow case. This is far from saying that they took into account the testimony given in the McKerrow case, which would of course have been improper.

Turning to the opinion in the McKerrow case, we find that the oil there involved showed a presence of 80.96 per cent to 96 per cent of unsaponifiable matter. The testimony of the importer's chemists in the present case shows the presence of saponifiable matter to the extent of 10.7 per cent, whereas the testimony of the Government's chemist shows the presence of but 5 per cent of saponifiable matter. Just how this difference may be accounted for the record does not disclose. But there was testimony tending strongly to show that the oil in question was entirely suitable for lubricating purposes, and there was also testimony tending to show that it was suitable for use by textile manufacturers for dressing wool, and that it was suitable for

use as a cordage oil and in batching of rope stock. This testimony was not uncontradicted, and it has become necessary to thoroughly examine the record in the case for the purpose of determining the question of fact.

To attempt to quote from the testimony of the numerous witnesses would extend this opinion beyond reasonable limits. It will suffice to say that in giving the conclusion of the board the consideration to which it is entitled in view of their better opportunity to judge of the testimony, we are unable to say in the present case that within the rule established by this court in *United States v. Riebe, supra*, p. 19 (T. D. 30776), the importer has made a case which justified us in setting aside the findings of the board. The case may be a close one on its facts, but we incline to the view that independent of any presumption of the correctness of the finding of the board, the preponderance of the evidence is with the Government.

It follows that the decision of the Board of General Appraisers should be *affirmed*.

SMITH, BARBER, and DE VRIES, Judges, concur.

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UNITED STATES v. READING ET AL. (No. 540).<sup>1</sup>

FISH, NOT THE PRODUCTS OF AMERICAN FISHERIES.

The American fishing vessel took no part in the fishing operations in question here except to convey from the United States to Newfoundland certain fishing supplies. A portion of the fishing tackle so conveyed was used under the supervision and by employees of an American citizen temporarily at Bonne Bay, Newfoundland; but the fishermen engaged there for service apparently used their own boats and presumably obtained there their supplies. The fish so caught were cured on British soil and shipped to the United States in a British vessel: *Held*, the importation was not entitled to free entry as the product of American fisheries under paragraph 567, tariff act of 1909.

United States Court of Customs Appeals, April 17, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7121 (T. D. 31028).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Edwin L. Wakefield* on the brief), for the United States.

No appearance for the appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers which sustained the protest of the importer and held that certain fish entered by the importer were entitled to free entry as

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<sup>1</sup> Reported in T. D. 31534 (20 Treas. Dec., 831).

the product of American fisheries under paragraph 567 of the tariff act of 1909. That paragraph places on the free list—

Fish, fresh, frozen, or packed in ice, caught in the Great Lakes or other fresh waters by citizens of the United States, and all other fish, the products of American fisheries.

The fish which were the subject of the present importation were caught in the waters within the district within which the liberty to take fish and to occupy and use the bays and harbors, in common with the subjects of His Britannic Majesty, in the drying and curing of same in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland and of the coast of Labrador, was granted by the treaty of 1818 between this country and Great Britain.

The record in the case shows that one Capt. Carter is the owner of the vessel *Sarah C. Wharf*, an American chartered tug fitted out for fishing; that she left Boston in 1907 and remained in the treaty boundaries of Newfoundland until 1909, at the time when these fish were caught; that Capt. Carter was there during the period and the business in question was conducted under his supervision. The fish covered by the present importation were caught in Rocky Harbor and cured on the shores of Bonne Bay, which adjoined. When the tug went north in 1907, she took with her \$800 to \$1,000 worth of trawl lines, nets for bait, hand lines, and hooks. At the time these fish were caught, the boat was not at Bonne Bay, but was some 30 miles distant in charge of an American captain with a crew partly American. How engaged at the time the fish in question were caught the record does not disclose. It would seem, therefore, that the connection of the boat with the case was not other than its use for the transportation of the fishing gear from Boston to Bonne Bay.

Capt. Carter testified that he employed residents of Newfoundland to catch the fish in question; that in some cases he furnished trawl lines and hand lines that were used by the men; that he paid them according to the catch, generally so much per pound; that he then hired them, giving them so much for curing them, and in some cases paid them by the day or by the hour to help in curing the fish; that the men, while so employed, were working exclusively for him and that he was bound by his contract to take all the fish they caught, and did so in the present case. The question presented is whether these facts constituted the enterprise an American fishery within the meaning of the tariff act.

The history of the industry shows that a somewhat liberal construction has usually been given to this provision. In December, 1886, the question was presented whether a cargo which had been taken by the crew of the vessel with the assistance of men and nets hired in Newfoundland for that purpose would be free of duty. The Secretary of the Treasury instructed the collector that such



fish, having been taken by an American vessel licensed for the fisheries, was entitled to free duty as the product of American fisheries. (T. D. 7933.)

In 1894 the question was presented as to whether fish caught off the banks of Newfoundland and purchased from traps, nets, or otherwise to make a cargo of an American fishing vessel, were the products of an American fishery. This question was answered in the negative. (T. D. 15479.)

In T. D. 28768 it appeared that the schooner *Bohemia* sailed from Gloucester on August 29, 1897, on a fishing trip with 11 men, all told; that upon arrival at Bonne Bay the master of the vessel engaged 20 men to fish for him, paying them at the rate of 1½ cents per pound for all fish caught by them; that such fish were delivered from the boats to the vessel and dressed on board the *Bohemia* by her regular crew.

In holding that these fish were the products of an American fishery, the Secretary said:

The department has frequently held that fish taken by an American vessel on the coast of Newfoundland "with the assistance of men, boats, and gear hired for the purpose," are free of duty as a product of American fisheries.

And added:

While said fish were paid for at the rate of 1½ cents per pound, it appears that it is the general practice of fishing vessels to pay for fish caught for them at a rate per pound, and as said fish were caught after the arrival of the *Bohemia* on the fishing grounds and expressly for that vessel, and were loaded directly aboard the vessel from the boats without having been landed ashore, the department is of the opinion that the same should be considered as having been caught by said vessel with the assistance of men, boats, and gear hired for the purpose and not as having been purchased.—T. D. 28768, citing the case of schooner *Whuland*, G. A. 5453 (T. D. 24738).

The Government contends that when fish are taken by foreign fishermen and subsequently purchased by an American citizen, or when fish caught by foreign fishermen hired by an American citizen, are taken from the fishing ground to a foreign shore and there dressed, frozen, salted, dried, or otherwise preserved for transportation, they are not entitled to free entry notwithstanding they are caught by an American, even though the owner of an American vessel conducts the enterprise, where, as appears in the present case, the vessel had no part in the fishing operations.

The Treasury Department, in a circular letter to the collectors of customs, signed by the Secretary of the Treasury, on January 17, 1911, defined an American fishery within the meaning of this paragraph to be a fishery operated under the American flag by American vessels in foreign waters in which such vessels have a right by treaty or otherwise to take fish and other marine products.

We have been cited to no case decided by the courts and to no construction by the department which holds that such an operation as

the present would fall within the language of the clause of the statute under consideration. It can not be said that all fish taken in the waters covered by the treaty between Great Britain and the United States are fish taken from an American fishery. The term "fishery" sometimes means the locus or the easement belonging to the riparian proprietor. Manifestly the term is not so used in the present tariff act. It has been extended to mean any enterprise conducted by an American fishing vessel flying the American flag, manned by American sailors, and in such case it has been held that fish caught by men not American citizens, hired for that purpose by the master of the vessel, are still the product of an American fishery.

This, it seems to us, is going quite as far as either the department or the courts can safely go. In the present case, as we have seen, the fishing vessel, which happened to be the property of Capt. Carter, engaged at Bonne Bay, had no part whatever in the actual operations involved in the taking of the fish which were the subject of this controversy. All that we have is the fact that the fish were caught under the supervision and by employees of an American citizen, temporarily at Bonne Bay, and that a portion of the fishing tackle was furnished by him. So far as the record indicates the boats employed by the fishermen were their own boats. The supplies furnished were presumably secured at Bonne Bay. Nothing to the contrary is shown. The fish were cured on British soil, and were shipped by a British vessel. And to hold that they are the product of an American fishery would result in permitting any American to go to British territory, prosecute his calling wholly through British employees, using British supplies, and bring himself within the clause of this statute permitting free entry. We think such was not the intent of Congress, and it follows that the decision of the Board of General Appraisers permitting free entry of these shipments must be *reversed*.

SMITH, BARBER, DE VRIES, and MARTIN, Judges. concur.

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UNITED STATES *v.* MICHELIN TIRE CO. (No. 204).<sup>1</sup>

1. INDIA RUBBER RECOVERED FROM SCRAP OR REFUSE.

Chopping old scrap or crude rubber, separating therefrom particles of iron, such as rivets, valves, etc., grinding the rubber into smaller particles, chemically treating, washing, riffling, and blowing these, are all done to separate the rubber from the other component materials of the scrap or refuse—in short, to recover or reclaim the rubber in a shape suitable for transportation and marketing; and it has not thus been manufactured, in whole or in part, becoming a particular manufactured article; it has rather been made fit as a single material to be manufactured anew.

2. SAME—UNDER PARAGRAPH 579, TARIFF ACT OF 1897.

Paragraph 579, tariff act of 1897, to be given its due and proper effect, must be taken to have placed on the free list all india rubber, whatever its condition, imported as a material for manufacturing india-rubber articles; and it applied to old scrap and refuse rubber, whether imported after separation or as the content of, or associated with, other materials as a part of articles formerly useful.

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<sup>1</sup> Reported in T. D. 31544 (20 Treas. Dec., 864).

## 3. SAME—DOUBT AS TO CONSTRUCTION, HOW RESOLVED.

The changed phraseology in the tariff act of 1909 relative to india rubber suggests a question at least in the mind of the Congress as to what is a proper construction of the similar clause in tariff act of 1897, but in the presence of doubt the importer should have the doubt resolved in his favor, and this importation was properly held by the board to be entitled to free entry under paragraph 579, tariff act of 1897.

United States Court of Customs Appeals, April 24, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,

Abstract 22658 (T. D. 30339).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Laurence*, on the brief), for the United States.

*Coudert Bros.* (*Frédéric R. Coudert* and *John P. Murray* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Appeal to the United States Circuit Court for the Southern District of New York duly transferred to this court.

The controversy is over the proper classification of so-called "reclaimed or recovered rubber." In some of the cases covered by this appeal the collector had classified the merchandise for duty under the provisions of paragraph 449 of the tariff act of 1897, as "manufactures of india rubber."

The material parts of that paragraph are:

449 Manufactures of bone, \* \* \* india-rubber, \* \* \* or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem; \* \* \*

In the other cases the merchandise was classified for dutiable purposes under the provisions of section 6 of the act.

SEC. 6. \* \* \* On all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

It should be stated that the earlier classification by the Government was abandoned and the second adopted at the direction of the Secretary of the Treasury after a decision of the Board of General Appraisers, and that practice has continued.

The importer in each case claims that the merchandise is free of duty under paragraph 579 of the act, which reads:

579. India rubber, crude, and milk of, and old scrap or refuse India rubber which has been worn out by use and is fit only for remanufacture.

The claims of the importer are based upon the allegation that this merchandise is old scrap or refuse india rubber which has been worn out by use and is fit only for remanufacture.

At the hearing testimony was introduced by the Government and by the importer. It was sought by the Government to establish that crude india rubber applied only to that taken directly from the india-rubber tree or plant and put in condition necessary for the purposes

of transportation and marketing; that the term "scrap rubber" was one well known in trade and commerce and did not include this merchandise in the condition imported, but was the material from which the imported merchandise was manufactured.

It will be noted in passing that the language of the free list is "*scrap or refuse india rubber*," and that no attempt was made to assign to the term "refuse india rubber" any commercial signification.

The Government further made contention that the various processes through which the merchandise had admittedly gone rendered it a manufactured article; and, not being india rubber, crude, or milk thereof, or scrap india rubber, it therefore became dutiable as an unenumerated manufactured article.

The importer maintains that the processes applied to the article as imported were not manufacturing processes and did not constitute the product a manufacture; that the processes were simply, as indicated by the name of the article itself, the reclaiming or recovering of rubber from a condition of uselessness as such and cleaning and assembling it solely for the purposes of transportation and marketing; and that being rendered by these processes fit only for remanufacture, it was entitled to free entry under paragraph 579.

There are many different processes by which the article is recovered or reclaimed, but the method of application and results are substantially the same. They are what are known as the acid process, the alkali process, the mechanical process, and others.

There is no serious dispute as to the different operations of the process which have been applied to this merchandise as imported. As indicated by the testimony and the samples, they are substantially as follows:

The old scrap and refuse from which the rubber was recovered consists of old rubber boots, shoes, bicycle tires, automobile tires, garden hose, air-brake hose, heavy hose, etc. The stock is first carefully sorted; in the case of tires and similar articles the metal valves are cut away and the coarse metal removed by hand; the material is then chopped into small particles by machinery, again carefully sorted, and then fed by hand into the machine and by it chopped. This chopped material is baled and stored for the purposes of further operations. It goes from these bales into the grinding department, where it is thrown into chutes passing into what are called "crackers" and cracked up into small pieces; then again it is fed to other grinders and ground finer. At this stage it yet has the particles of fabric in it, and from there is passed into what are called "heaters," where it is treated by a chemical solution for the purpose of removing the particles of fabric. It is discharged from the heaters into what are called "washers," where the dirt, sand, and the particles of cloth and the chemical solution remaining are washed away. This operation

is of water alone. It is then "riffled," crimped up over long riffers, which allow whatever additional particles of sand or metal that may remain to settle. A riffler is a long sheet built the length of the building, a trough several feet wide and possibly a couple of feet deep. From the riffler it goes into the settling tanks, where the water is drained off. It then goes into a machine where it is pressed out, and from there on to dry screens where the stock is artificially dried by heat at 220° F. blown through the stock by fans. It is then taken into the mills and sheeted; that is, comes out in a large slab. It is sometimes thereafter sent to the refiners, where it is sheeted into the commercial sheets, just as thin as can be made, for the purpose of crowding down and crushing the lumps.

This is the process as described by the makers of similar materials in this country. It appears from the record that the imported merchandise has not undergone the refining operation. Some of the witnesses describe the process as one of less detail of intermediate operations, but in our view of the case, from the character of the various operations described, this becomes unimportant.

This product is fit for manufacture for all purposes for which india rubber is usable. Sometimes it is used alone, but more frequently and usually with crude rubber. It is of but one-tenth to one-twelfth the value of crude rubber. Like crude rubber, it is fit for manufacture in some cases without any additional processes being applied to prepare the rubber for manufacture. When additional processes are applied they are different only in degree. The chief difference, as shown by the record, is that it is impossible to successfully devulcanize rubber, and consequently this imported article is to an extent vulcanized. So the particular use may control.

The first question for determination is whether or not this application of processes amounts to a manufacture. We think not.

They are all devoted to one end, as indicated by the name of the merchandise itself, "reclaimed or recovered rubber," to wit, the recovering of the rubber content from old worn-out goods into which it had been manufactured and of which it forms one of the component materials. The chopping of the old scrap or crude rubber, the segregation by hand therefrom of particles of iron, such as rivets, valves, etc., the grinding into smaller particles, the chemical treatment to which it is subsequently subjected, the bath which it undergoes immediately thereafter, the riffing and the blowing, are each and all devoted to the single and only purpose of separating the rubber from the other component materials of the scrap or refuse, and recovering or reclaiming it in a clean and pliable condition, eliminating therefrom all other parts of the scrap and adhering foreign matter.

The subsequent operations, even if we include the refining, which is not applied to the imported article, are applied not for the purpose

of putting the material on its course of manufacture toward some ultimate article into which it is to be subsequently made, but are solely and only for the purpose of recovering and assembling it, as all rubber is assembled, into a form suitable for transportation and marketing. It has not been entered to any degree upon its course as any certain manufactured article, but is a raw material suitable for use in the manufacture of innumerable articles. Nor is it a manufactured material, but rather "demanufactured," if the term may be used, and recovered and restored so far as can be to its original condition as a single material.

There are numerous authorities that these processes do not constitute a manufactured article, or a manufacture of a material.

Thus in *Hartranft v. Wiegmann* (121 U. S., 609), the Supreme Court said:

Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton.

In *Frazee v. Moffitt* (20 Blatch., 267) the same court held that—

Hay pressed in bales, ready for market, was not a manufactured article, though labor had been bestowed in cutting and drying the grass and baling the hay.

In *United States v. Wilson* (1 Hunt's Merchants' Magazine, 167), cited with approval by the Supreme Court in *Hartranft v. Wiegmann* (121 U. S., 609), the court said that—

Marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

In *Littlejohn v. United States* (119 Fed. Rep., 484) the similar principle was announced. The court said, it being contended that sago flour was not crude, because the pulp of the sago tree had been subjected to certain processes:

\* \* \* The only manipulations which it undergoes in the foreign country are those which are necessary to fit it for importation, and consist in successive cleansing operations in order to get rid of the impurities which would otherwise cause fermentation.

\* \* \* *In this case the processes of cleansing are essential to fit it for trade and commerce in this country; they neither refine nor manufacture it, but only serve to remove the impurities. Such processes are not sufficient to change its character from a crude product to a manufacture.*

In *McKesson v. United States* (113 Fed. Rep., 997) it was contended that crude sulphide of antimony was entitled to free entry as "antimony ore, crude sulphide of," as against the Government's contention that the merchandise was an unenumerated manufacture in whole or in part. It appeared that the merchandise was the product of a process by which the gangue or slag and rock were removed and only the ore was imported. The contention of the importer was sustained. That was essentially a recovering or reclaiming process such as this.

This court likewise has observed the same distinction. In *United States v. Salomon Bros.* (T. D. 31277; 1 Ct. Cust. Appls., 246) we held

that what are called linters, a short-fiber cotton taken from the cotton machine, boiled with a mixture of hot water and soda ash to loosen the dirt, and afterwards treated with chloride of lime, and then washed in pure water, left to dry, and put up in bales ready for shipment to this country, and sold principally for the manufacture of smokeless powder, was still cotton.

Very elaborate processes by machinery, even though patented machinery, do not always constitute a manufacture. There are many well-known processes to which materials are subjected the result of which is not a manufacture. For example, the shells in the Wiegmann case were subjected to elaborate and possibly patented processes. The hay passed upon in the Frazee case was no doubt mowed by a patented machine, and raked by a second, and pressed and baled by a third. Nevertheless, the application of these processes did not constitute a manufacture in the judgment of the Supreme Court. So with ordinary laundry work. One's linen is treated with acid and machinery which is the subject of a patent, yet no one would contend that these processes resulted in a manufacture. In many, if not most, cases of modern work of this character the articles are subjected to hot-water baths containing alkalies, as is this material; they are whipped and run, as is this material; they are subjected to acids, as is this material, all for the same purpose of each process applied to this material, namely, for the purpose of cleaning the same; yet these processes so applied have never been held to constitute a manufacture. They have at Hull, England, what is known as the willowing process, which process acts in conjunction with others used for taking oil from the wool. They are all patented processes. They beat and whip out the dirt and extract the oils, as the processes applied to this old scrap extracts the cotton fibers and dirt. The products are subsequently pressed and baled, and yet no one would characterize this wool as imported a manufacture of wool or manufactured wool.

We are of the opinion that the processes devoted to this merchandise, as imported, did not constitute it a manufactured article in whole or in part.

The two paragraphs wherein the Congress appears to have endeavored with a few express exceptions to provide for india rubber are paragraphs 449 and 579 of the free list, quoted. We have not overlooked paragraph 450. It is instructive to compare the precise language of the two paragraphs. We think they evidence the purpose on the part of Congress to provide for india rubber in precise detail, commencing in its earliest obtainable conditions and concluding with its highest manufactured status. These provisions are for "manufactures of india rubber, wholly or in chief value," as provided in paragraph 449; and, "india rubber crude, milk thereof, and old scrap or refuse india rubber which has been worn out by use and is fit only for remanufacture."

The manifest purpose of Congress, in paragraph 579, was to put on the free list all india rubber, whatever its source or condition, which was imported to be used as a material in the manufacture of india-rubber articles. India rubber, crude, and milk of india rubber were well known and easily described. Old scrap or refuse india rubber, owing to the sources from which it was obtained and condition in which it was found, needed qualifications lest there be introduced free under that term otherwise dutiable articles. The actual thing made free by this provision seems to have been lost sight of. It is a provision enacted solely for the purpose of permitting free entry of india rubber as and when a manufacturing material. If we constantly bear this thought in mind, it seems to us many of the difficulties of construction will be avoided. The Congress having in mind rubber only, and that the source of much of this rubber in condition as found was old shoes, tires, hose, and other similar sources, which were apparently "articles" or "manufactures" dutiable under other specific provisions of the tariff law, confined its language in paragraph 579 so as to embrace only the rubber contained in these old articles. It is not old rubber shoes or old rubber tires or old rubber hose that are made free; but it is the old scrap or refuse rubber found in these things, and that there be no conflict between this provision and other provisions of the tariff law making these things, when articles or manufactures, dutiable, the Congress added the words "which has been worn out." In order to assign these words of the statute any voice whatever in the framework of its import, it is necessary that they should be construed as confining the paragraph to such sources of old scrap or refuse india rubber as had previously been "articles" or "manufactures," but which by virtue of being "worn out" ceased to be articles or manufactures of commerce within the meaning of the provisions of the tariff law. In other words, the force and effect of these words in the paragraph confines the "old scrap and india rubber" to the india-rubber material, which is found in combination with particles of iron or cotton and dirt adhering thereto, remnants of what were formerly articles or manufactures, but which by virtue of having been "worn out" by use have ceased to be such in the tariff sense and left the india rubber therein the valuable content.

This is precisely the view taken by the Supreme Court of the United States in approaching the question from another angle. In *Cadwalader v. Jessup & Moore Paper Co.* (149 U. S., 350) the Supreme Court said:

The uncontradicted testimony is to the effect that the only commercial use or value of the old india-rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, and not by reason of any preparation or manufacture which they had undergone; that they could not fairly be called "articles



composed of india rubber," and as such dutiable \* \* \* ; and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial value as such articles, and substantially were merely the material called "crude rubber." They were not india-rubber fabrics, or india-rubber shoes, because they had lost substantially their commercial value as such.

The Congress by this provision had in mind that india rubber recovered from these old worn-out articles, and also that found and imported in the articles themselves, should be free—that is, this class of india rubber should be free without regard to its condition or environment if that were worthless.

This construction by the Supreme Court was of the provisions of the tariff act of 1890, paragraph 613, which is identical with paragraph 579 of the tariff act of 1897.

We think the paragraph plainly provides that old scrap and refuse india rubber shall be free, whether imported as the content of or associated with other materials, which formed a part of the article of its past usefulness; or, segregated therefrom, cleaned and put in shape for use as a material for manufacture.

In cases where the importation is the unreclaimed content of old articles, for example, old shoes, the phrase "which has been worn out by use" indicates the congressional intent by so limiting the scope of the free-entry paragraph that it excludes therefrom all such articles as have not, by means of use, lost their character as articles or manufactures in the tariff sense and become old scrap or refuse india rubber, valuable only for their india-rubber content.

If the india rubber of this source imported is not such a content, but recovered or reclaimed india rubber, as in this importation, then we think the words "and is fit only for remanufacture" were inserted for the purpose of and do prescribe a limitation upon the manipulations and conditions which may attend india rubber obtained from that source in order that it may be entitled to free entry, and beyond which it ceases to be so entitled.

The record shows that this limitation puts reclaimed rubber upon precisely the same basis as to condition as crude rubber, and assigns to the paragraph a uniform effect upon all india rubber imported as a manufacturing material.

This is the only possible office that can be assigned the phrase "and is fit only for remanufacture." Some effect must be given that phrase if possible.

Standing alone and without these words the other language of the statute, "old scrap or refuse india rubber," was sufficient to admit free of duty such when imported as a content of any old article worn out by use. But it might reasonably be held that the words "old scrap or refuse india rubber" would not include rubber material recovered from old scrap or refuse india-rubber articles, which by reason of that recovery has undergone several processes, acquired a

new name and greater value, unless it be held that the designation refers to that rubber which is produced from old scrap or refuse rubber, taking its name from its source.

The introduction of the phrase "and is fit only for remanufacture" into that paragraph, which assigned the import stated as its only effective office, renders that possible construction of the preceding words unimportant, for it expressly extends their natural scope to old scrap and refuse rubber in all conditions up to and including, but only including, that of being ready for manufacturing purposes.

That the language of paragraph 579 does include rubber from that source, imported as a content of the articles of its former use, was expressly decided by the Supreme Court. It was there contended that the merchandise thus imported was dutiable as articles of rubber, but the court held as quoted, *supra*, that being "worn out by use" they ceased to be "articles" or "manufactures" in a tariff sense and were free as "old scrap or refuse rubber" within this precise tariff language in the tariff act of 1890. *Cadwalader v. Jessup & Moore Paper Co.* (149 U. S., 350).

Unless the construction before noted is given the words "fit only for remanufacture" there would be a hiatus between the provisions of paragraph 579 and those of 449 in that scrap or refuse india rubber which had applied thereto well-known processes affecting the condition of this importation, but not having arrived at the condition of being a manufacture of india rubber were not provided for. If the purpose, therefore, of Congress of providing for all classes of this material from the lowest to the highest manufactured condition is to be given effect, the stated purpose of adding the words "fit only for remanufacture" and their intended effect becomes apparent.

We believe that it was the intention of Congress to include such merchandise as this importation within paragraph 579, and that in the view stated that purpose was accomplished by the language employed.

In any view it seems self-evident that the india-rubber *product*, whatever it may be termed in trade, of processes applied to old scrap or refuse india rubber, might well be included in the descriptive term "old scrap or refuse india rubber," deriving its description from its source of immediate production. In fact, we do not see how that conclusion can be seriously denied, and that being true, or even if only doubtful, the importer, appellant, is entitled to judgment upon the doctrine of doubt. It must be confessed that the character of the merchandise imported when considered in conjunction with the various provisions of law invoked is not entirely free from doubt. It might be better said that the proper interpretation of the language of paragraph 579 and its intended scope by Congress is not entirely free from doubt. The changed phraseology of the corresponding paragraph in the tariff act of August 5, 1909,

indicates at least a question in the mind of Congress as to the proper construction and import of the provision of the tariff act of 1897.

In the presence of doubt the importer is entitled to have the doubt resolved in his favor.

In *Hartranft v. Wiegmann* (121 U. S., 609) the Supreme Court said:

But, if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers v. Barney* (5 Blatch., 202); *United States v. Isham* (17 Wall., 496-504).

We are of the opinion that the decision of the Board of General Appraisers should be *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and MARTIN, Judges, concur.

UNITED STATES v. OBERLE (No. 232). UNITED STATES v. ILLFELDER (No. 233).<sup>1</sup>

1. SUBSTITUTION OF RECORDS ON HEARING BEFORE BOARD.

Where a rule had been promulgated by the Board of General Appraisers providing that in classification proceedings the record and testimony in one case might be admitted as the record and testimony in another, if a like case, but providing, too, for a reexamination and cross-examination of witnesses if moved for, proceedings on such a substituted record could only be proper after due notice, so that witnesses might be reexamined or cross-examined as might or might not be desired.

2. COMMERCIAL DESIGNATION, INSUFFICIENT EVIDENCE OF.

Where only one witness has testified to the commercial designation of an article, this is insufficient evidence to prove an accepted use of the term in commerce.

3. REVIEW OF QUESTIONS OF FACT.

This court may review questions of fact, but when a decision by a board is made to rest on a record that is not a part of the record here, there is not here sufficient testimony to warrant the finding of the board being sustained.

United States Court of Customs Appeals, April 24, 1911.

APPEALS from decisions of the Board of United States General Appraisers, Abstract 23092 (T. D. 30547).

[Reversed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

*Brown & Gerry* for appellees.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

In the decision of these protests the general appraiser of his own motion consolidated the testimony taken in two other cases involving similar merchandise and issues.

The merchandise was very small mirrors. The question was whether they were dutiable as toys or as mirrors, under the respective applicable paragraphs of the tariff act of 1897.

The Government ultimately contends that if the records were consolidated upon the motion of the general appraiser himself, the Gov-

<sup>1</sup> Reported in T. D. 31545 (20 Treas. Dec., 873).

ernment was without notice of that action. The record does not disclose that the Government had express notice, nor does the statement of the general appraiser deciding the cases allege that the Government had other than presumptive notice.

As the protests were set for hearing October 20, 1908, and decided April 14, 1910, and during the interim there were substantial changes in the procedure of the board and positive changes in its rules, absence of notice on the one hand and failure to take notice on the other might well occur.

It is contended by the importers' counsel that inasmuch as the protests arose many years before, and there were at that time no rules of the board requiring such notice, the point is not well made by the Government counsel. The protests in question, however, were decided April 14, 1910. When the order of consolidation was made does not appear. In view of the rule of the board it would seem unimportant.

At the time of the decision of the cases the following rule of the Board of General Appraisers had for several months been duly promulgated:

RECORDS IN PREVIOUS TRIALS AS EVIDENCE.

XXXIV. Where a question of the classification of imported merchandise is *under consideration for decision* by any one of the boards, and a decision has been previously made involving the classification of goods substantially the same in character, the record and testimony taken in the latter case may, within the discretion of the board, be admitted as evidence in the pending case on motion of either the Government or the importer, or on the board's own order: *Provided*, That either party may have any one or more of the witnesses who testified in such case summoned for reexamination or cross-examination, as the case may be. This rule shall furthermore apply to the printed records which may have been acted on by the courts in case of appeals taken from the decisions of the board.

It will be observed that the right to consolidate records is vested in the board hearing the case conditional upon the fact that either party may have any one or more of the witnesses who testified in such case summoned for reexamination or cross-examination.

We think the rule of the board applied by its very terms to these cases, and are satisfied from the record that the opportunity of cross-examination required by the rule upon consolidation of the records was not afforded by proper or sufficient notice.

It further appears by the record that the protests were decided upon authority of G. A. 5526 (T. D. 24869). The testimony in that case does not accompany this record.

From the description of the merchandise in that decision, the subject thereof, we are not clear, and it is not shown by this record, that the merchandise covered by these protests and held dutiable as toys was of the same dimensions in the determining features as that held dutiable as toys in the previous decision.

Moreover, there is evidence in the record that whether or not an article comes within the designation of "toys" when used in the tariff

act is a question of commercial designation. If the decisions of the board are rested upon the testimony consolidated herewith by the Board of General Appraisers in making decision of these protests, that testimony in that particular is plainly and unequivocally insufficient. But one witness testified, an employee of the importers, that these articles were commercially known as toys. One witness is insufficient for the purpose of establishing commercial designation when the testimony is no other than that included in this record.

Whether there was any testimony as to commercial designation and whether there was sufficient testimony, if any, upon that point in G. A. 5526 (T. D. 24869) is not apparent from this record, because, as stated, the record in that case was not upon motion of either party, or the general appraiser upon his own motion, incorporated in this record.

This court, by the law when the point is invoked, is empowered to review questions of fact as well as law. *United States v. Reibe* (1 Ct. Cust. Appls., p. 19; T. D. 30776).

It seems unnecessary to say where a decision is rested upon a record or records in which the crucial point in the issue is one of commercial designation or any other probative fact, and those records are not a part of the record before this court, there is not before the court sufficient testimony to sustain the finding of the board.

Accordingly the decisions of the board in these cases are *reversed*, with directions that, after due notice, new trials be had in each case.

MONTGOMERY, Presiding Judge, and SMITH and BARBER, Judges, concur.

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FENTON v. UNITED STATES (No. 385).<sup>1</sup>

CORK FLOATS—MANUFACTURES OF CORK.

Small, oval-shaped pieces of cork tapering at one or both ends and with holes lengthwise through them, would seem on examination not to be, and they appear by the uncontradicted testimony not to be, either fishing floats or cork floats for use in fishing. They are not commercially known as fishing tackle or parts thereof, nor are they in fact, as it appears, used as such. They are manufactures of cork and dutiable as such under paragraph 429, tariff act of 1909.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23431 (T. D. 30667).

[Reversed.]

*McLaughlin, Russell, Coe & Sprague* (Edward P. Sharretts of counsel) for appellant.  
*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved is so-called cork floats, was imported at the port of Cleveland in 1909, and was assessed for duty by the

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<sup>1</sup> Reported in T. D. 31546 (20 Treas. Dec., 875).

collector at 45 per cent ad valorem under paragraph 165 of the tariff act of August 5, 1909, which reads as follows:

165. Fish hooks, fishing rods and reels, artificial flies, artificial baits, snelled hooks and all other fishing tackle or parts thereof, not specially provided for in this section, except fishing lines, fishing nets and seines, forty-five per centum ad valorem.

The appellant duly filed his protest, the material parts of which are as follows:

Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision assessing duty, on the entries below named. The reasons for objection are as follows:

Cork floats are manufactures of cork, or cork chief value.

Manufactures of cork, wholly or in chief value, are provided for by name in paragraph No. 429 at 30 per cent.

Their use is not necessarily confined to fishing tackle, but were this not true the words "not specially provided for" found in paragraph No. 165 eliminate cork floats therefrom.

Designation of an article by name free or dutiable must prevail over words of general description.

Paragraph 429 of the act of 1909 is as follows:

429. Cork bark cut into squares, cubes, or quarters, eight cents per pound; manufactured corks over three-fourths of an inch in diameter, measured at larger end, fifteen cents per pound; three-fourths of an inch and less in diameter, measured at larger end, twenty-five cents per pound; cork, artificial, or cork substitutes, manufactured from cork waste or granulated cork, and not otherwise provided for in this section, six cents per pound; manufactures, wholly or in chief value of cork, or of cork bark, or of artificial cork or cork substitutes, granulated or ground cork, not specially provided for in this section, thirty per centum ad valorem.

The Board of General Appraisers overruled the protest and we quote the pertinent parts of their decision:

The merchandise is invoiced as "manufactures of cork." The goods are in fact cork articles shaped, and specially adapted for use as floats. They were assessed for duty at the rate of 45 per cent ad valorem under the provisions of paragraph 165, tariff act of 1909, which reads: "\* \* \* all other fishing tackle or parts thereof, not specially provided for \* \* \*." It is claimed that the articles are dutiable \* \* \* under paragraph 429 \* \* \* as "manufactures of cork, not specially provided for." The only issue raised is whether the corks here in question are within the provision for "fishing tackle or parts thereof." It is urged that they must be further manipulated in order to convert them into floats, and as they are not finished cork floats they are not dutiable under the provision above noted. The corks approach nearly their finished condition, afford sufficient evidence as to their special adaptation for use as floats, and would, then, appear to us to be dutiable as "parts" of fishing tackle.

At the outset the United States contends that the protest does not claim that the articles are not fishing tackle or parts thereof, but on the contrary recognizes them as cork floats, thereby, it is said, basing the protest upon the ground that the provision "manufactures, wholly or in chief value of cork," under paragraph 429, is more specific than that for "fishing tackle or parts thereof" under paragraph 165, and therefore the United States claims that the only

issue is which paragraph is the more specific. Stated in another way, this claim is that under his protest the appellant has no right to contend, as he seeks in substance to do here, that the articles involved are not floats and thereby parts of fishing tackle within the meaning of paragraph 165, but that he has conceded them to be floats and is limited to the claim that paragraph 429 more specifically applies thereto than does paragraph 165.

The record does not show that the United States made this claim before the board.

We think this contention can not prevail. The first claim made in the protest is that cork floats are manufactures of cork or cork of chief value. The reference to the articles as "cork floats" is not significant. They may be such and still not be floats or fishing tackle or parts thereof. From the collector's letter submitting the protest it would seem that he had classified them as cork floats and the importer should have the right to adopt that designation in his protest, without precluding himself upon the merits. The protest clearly raises the issue that the merchandise is a manufacture of cork or cork of chief value.

Before considering the question involved we turn to the evidence. It appears that the United States called no witnesses and that two were introduced by the appellant. This case seems to involve protests by other importers and the first witness, Mr. Pflueger, was one of the number. He testified in substance that he was a manufacturer of fishing tackle and metal novelties; that he was a practical fisherman and a member of several fishing clubs and organizations; that he never saw an article like the official samples used either for fishing tackle or as a part of it; that they were turnings, manufactures of cork; that he did not manufacture the same; that he had been in the business of manufacturing fishing tackle and metal novelties for 30 years and had had experience covering the same time selling the products; that he had never sold such an article as the official samples in this case as fishing tackle; that he had never heard them referred to as such; that there was an article well known as fishing tackle which he designated as a fishing float, samples of which were introduced in evidence as illustrative exhibits and are before us; that he sold these as fishing floats all over the world; that they were used to regulate the depth of the bait from the surface of the water and also to indicate that the bait had been taken by a fish; that such a float comes under the paraphernalia of fishing tackle; that the official samples are not in themselves finished articles; that to make them into fishing floats they must receive the following treatment and manipulations: They must be kiln dried to exclude all moisture so that paint will adhere firmly to the surface; then sticks or quills are inserted and cemented into the holes in the center of the samples;

then they are put into a lathe and turned to the proper shape and tapered down to meet the stick on each end and finished up to make a graceful shape; then sandpapered; then tumbled in a rolling barrel in which is thrown a substance while they are rolling that is absorbed into the pores and makes a waterproof surface; then permitted to dry; then painted, usually in more than one color; and then after again drying receive a coat of waterproof varnish to make the finished article waterproof. He further testified that the official samples were used for no other purpose so far as he knew except to make fishing floats in the manner just set forth; that he had been importing them for 30 years; that the object he had in ordering the articles shaped as are the official samples was to make fishing floats therefrom; and that when imported they were not true to shape but had to be re-turned, reshaped.

The other witness testified that he was a dealer in and bought and sold all the different kinds of fishing tackle, buying from nearly every manufacturer of that product in this country, and that he bought and sold goods like the illustrative exhibits as fishing tackle; that they were staple goods; that he did not handle goods like the official samples, and that they "couldn't be adaptable for any fishing tackle that I know of."

The official samples which are before us are small, oval-shaped pieces of cork, tapering at one or both ends, each having a small hole passing through the center at right angles to the largest diameter. The appearance of the illustrative exhibits, also before us, indicates that they were produced substantially as indicated by the witness from articles similar to the official samples. We think this uncontradicted evidence requires a finding of fact that the official samples are not when imported either fishing floats or cork floats used in fishing. Are they fishing tackle or parts thereof? The evidence indicates that neither are they commercially known nor in fact used as such.

The words "all other fishing tackle or parts thereof" in the paragraph must be given their ordinary meaning unless limited by the context. The Century Dictionary defines fishing tackle as "An angler's outfit; angling gear; the hooks, lines, rods, and other implements of the art of fishing," and the statute apparently uses the words in like sense.

We think it is apparent that the term "all other fishing tackle" is a collective designation inserted for the purpose of including any fishing tackle not specifically enumerated, and that the words "parts thereof" are inserted as a precaution and refer to such completed articles as may be used by anglers, either alone or in connection with another article. A part of a fishing tackle may well mean a rod or a reel, a hook or a line, and these articles are also in themselves fishing



tackle and collectively so designated. But we do not think in its common, ordinary meaning the term "fishing tackle" includes a rod, reel, hook, or float that is not in finished condition ready for the angler's use, and the term "parts thereof" must refer to the completed article, whatever it may be, that is also ready for use either alone or in connection with other articles of the angler's outfit. When ready for use it is a part of the fisherman's tackle, his outfit, one of his implements; and if not in a condition to be used, of course he can not use it, and it is not fishing tackle or a part thereof.

The official samples, under the evidence, are not ready for the angler's use, and to hold them to be a fishing tackle or part thereof we think would do violence to the ordinary meaning of the words. Such a holding would involve the further conclusion, which seems unwarranted, namely, that Congress intended that an unfinished article, composed of nothing but cork, should be classified under Schedule C of the tariff act, which in its general scope relates to metal and its manufactures.

But it is urged by the United States that these importations are not manufactures of cork because, it is said, that not having a distinctive name, character, or use different from that of cork, and not being capable of use in the form in which they are imported, they do not fall within the definition of manufactures as laid down by the Supreme Court, and we are referred to decisions of that court to support the contention.

It is many times concededly difficult to define what is a manufacture of a given article within the meaning of different paragraphs of tariff acts, and equally difficult to determine whether a given product is or is not a manufacture thereunder. There are many judicial pronouncements on these questions that at first reading do not seem consistent with each other, and we shall not now make an attempt to reconcile them.

It was said in substance in the case of *Lawrence v. Allen* (48 U. S., 785) that a manufacture in some instances and for some purposes may be one kind of process performed on an article in its natural state and in some another kind.

In the *Tidewater Oil Co. v. United States* (171 U. S., 216), referring to the subject of manufacture, the court said:

"Manufacture" is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture each one of which is complete in itself but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window

sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name, \* \* \* the finished product of one manufacture thus becoming the material of the next in rank.

In *United States v. Dudley* (174 U. S., 670) the court refers with approval to the last-mentioned case and says:

In other words, a new manufacture is usually accompanied by a change of name, but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one thing only. So long as "dressed lumber" is in a condition for use in house and ship building purposes generally, it is still "dressed lumber"; but if its manufacture has so far advanced that it can only be used for a definite purpose, as sashes, blinds, moldings, spars, boxes, furniture, etc., it becomes a "manufacture of wood."

Assuming the foregoing decisions of the Supreme Court furnish an outline for a rule enabling us to determine what is a manufacture, it follows, we think, both upon reason and authority, that when merchandise, as in this instance cork bark in its crude state, has been subjected to manipulations which have reduced it to a form and shape so that it can only be used in the manufacture of floats, which is clearly a definite purpose, it has become a manufactured article, and is a manufacture of cork. It is no longer cork in its crude state, but has been so manipulated that it is the finished product of one manufacture and is ready for the next in rank, namely, the manufacture of floats. Whether it has taken on a new name is not essential; it is only adapted to one use, and the evidence leaves it perfectly clear that it has yet to be subjected to, and is now ready to undergo and receive, the different operations and combinations that are required to make it into floats.

If wood so far treated as to be usable only for making sashes, blinds, etc., is a manufacture of wood, we have no doubt that these official samples are by the application of the same principle and the same reasoning manufactures of cork.

The various cases cited by the United States to support its contention last mentioned, upon careful examination, do not seem to be at variance with this conclusion.

It is held that the merchandise involved in this case is a manufacture of cork and as such is dutiable under paragraph 429 of the tariff act of 1909.

The result is that the judgment of the Board of General Appraisers is *reversed*.

MONTGOMERY, Presiding Judge, and HUNT, SMITH, and DE VRIES, Judges, concur.

TUSKA v. UNITED STATES (No. 408).<sup>1</sup>

## 1. BASKETS MADE OF BAMBOO SPLITS.

Baskets made of flat-looking narrow strips of split bamboo and so thin as to be flexible and capable of being woven into a desired form are manufactures of chip and were dutiable under paragraph 449, tariff act of 1897.

## 2. BAGS AND BASKETS MADE OF WISTARIA OR RATTAN.

Both wistaria, a vine-like shrub with a bark, and rattan, which belongs to the palm family, have the appearance and general qualities of wood; and bags and baskets made of either were dutiable under paragraph 208, tariff act of 1897.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23521 (T. D. 30710).

[Reversed.]

*John Gibbon Duffy* (*Joseph G. Kammerlohr* of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DEVRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York assessed certain imported bags and baskets as manufactures of wood under the provisions of paragraph 208 of the tariff act of July 24, 1897, which paragraph reads as follows:

208. House or cabinet furniture, of wood, wholly or partly finished, *and manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act*, thirty-five per centum ad valorem.

The importers protested that the goods were not manufactures of wood, and claimed that some of the articles were manufactures of chip, that others were manufactures of grass or weeds, and that all of them were dutiable under the provisions of paragraph 449 of the same act, which paragraph reads as follows:

449. Manufactures of bone, *chip, grass, horn, india-rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or either of them is the component material of chief value, not specially provided for in this act*, thirty per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof.

Chip is defined as—

A small, thin or flattish piece of wood or stone, cut or chopped out. (Standard Dictionary.)

Wood or Cuban palm leaf split into slips or straw plaited in a special manner for making hats or bonnets. (Webster's International Dictionary.)

From the evidence we conclude that chip is made by splitting or shaving wood into thin, flexible, narrow strips. Considering the

<sup>1</sup> Reported in T. D. 31547 (20 Treas. Dec. 881).

process of manufacture in conjunction with the definitions given, we are of the opinion that the chip referred to in paragraph 449 may be defined as flat, narrow strips of wood split or shaved to a thinness and flexibility which will permit of their being woven, braided, or plaited into a definite shape or form. That chip is not limited by the statute to such material as is fit only for the manufacture of hats and bonnets does not seem to be debatable. Paragraph 409 specifically provides for hats, bonnets, and hoods made of chip, from which it may be deduced that the provisions in paragraph 449 are meant to cover manufactures of chip other than hats, bonnets, or hoods made of chip. From the testimony and samples it is evident that the baskets represented by Exhibits 1, 2, 6, and 7 are made of flattish, narrow strips of bamboo split so thin as to be flexible and to allow of their being woven or braided into the form desired. As bamboo is admittedly a wood, we must hold that the baskets so made are manufactures of chip and therefore dutiable under the provisions of paragraph 449. *Morimura v. United States* (167 Fed. Rep., 687; T. D. 29566.) See also T. D. 29696.

It seems to be conceded in the briefs that all of the bags and baskets not made of split bamboo, and which are represented by Exhibits 3, 4, and 5, are manufactured from material supplied by the plant known as wistaria, although there is some evidence tending to show that the material used in some of the bags and baskets is rattan. But whether made of wistaria or rattan we can not agree with counsel for the importers that such articles are manufactures either of weeds or grasses. Wistaria is a vinelike shrub with a bark. Rattan belongs to the palm family and is classed as a wood by paragraph 700. Both wistaria and rattan have the appearance and general qualities of wood and few, if any, of the characteristics of weeds or grasses as these terms are commonly understood. In our opinion the goods made of wistaria or rattan were properly assessed as manufactures of wood under the provisions of paragraph 208, and the decision of the collector as to such goods must be sustained. The entries will therefore be reliquidated, and all bags or baskets of split bamboo, represented by Exhibits 1, 2, 6, and 7, will be assessed for duty as manufactures of chip under the provisions of paragraph 449, and all bags or baskets of wistaria or rattan, represented by Exhibits 3, 4, and 5, will be assessed for duty as manufactures of wood under the provisions of paragraph 208.

From the record at hand it is impossible to determine with precision how far the decision of the Board of General Appraisers conflicts with this determination, but in so far as the decision does conflict it is *reversed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

UNITED STATES *v.* RICHARDS (No. 416).<sup>1</sup>

## 1. LEATHER BELTING.

There is no uniform general trade meaning attached to the words "leather belting" confining it to that class of leather suitable in making belts for the transmission of power.

## 2. PICKER STRAP AND APRON LEATHER.

The importation here of leather to be used in the manufacture of appliances in textile machinery, namely, picker strap and apron leather, falls properly within the description "belting leather" as used in tariff act of 1909; it includes equally leather suited to transmit power from wheel to wheel and leather suited simply to convey materials, and is dutiable as belting leather under paragraph 451 of that act.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7069 (T. D. 30793).

[Affirmed.]

*D. Frank Lloyd*, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

*Searle & Pillsbury* (*Wm. E. Waterhouse* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

These importations are of leather. They are variously described upon the invoices as "green butts leather," used for making conveyor belts for wool-combing machines; "white butts," used principally for aprons in textile machinery; "one-half butts, dry chrome picker leather," chiefly sold for the manufacture of "picker bands" or "picker straps," which operate on rims or levers to throw the shuttles on looms; "light black English picker butts," of the same use as the picker bands; and "chrome bands," which are narrow bands used for covering the rims of certain wheels on textile machinery.

The importation in the greater part was of, and this controversy chiefly concerns, what are known as "apron leathers," which are leathers of a peculiar preparation for the purpose of being made into conveyors in worsted machines, so designed as to draw wool from the comb and transmit it to the coiler, the apron passing between rollers and being propelled by them.

Duty was assessed upon all the leathers by the collector at the port at Boston at the rate of 15 per cent ad valorem under the provisions of paragraph 451 of the tariff act of 1909, as "all other leather."

The importers contend that they are dutiable at 5 per cent ad valorem under the same paragraph as "Band, bend, or belting-leather."

The paragraph, in so far as we deem it pertinent, is as follows:

451. Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, \* \* \* fifteen per centum ad valorem; \* \* \*.

<sup>1</sup> Reported in T. D. 31548 (20 Treas. Dec., 883).

The Board of General Appraisers sustained the protests. At the hearing before the board many witnesses testified, and the record is a voluminous one. The Government sought to establish that the term "belting leather," as used in the paragraph, was one of commercial designation, which referred to and included only a class of leather different from and excluding that of this importation. The importers introduced testimony tending to show that there was no such uniform and general commercial understanding, and that these importations were equally known as belting leathers in that they were used for conveyors and that such were belts.

It is agreed by all parties that the terms "band leather" and "bend leather" have no general and uniform commercial meaning other than or different from their descriptive signification.

In commenting upon the testimony the board made the following observations:

On the trial a large number of witnesses were examined and considerable feeling was evidenced by a number of them. Having had opportunity of hearing the witnesses and observing their manner and speech, it was impossible to escape the conclusion that, consciously or unconsciously, much of the testimony was biased along the lines of personal interest. This was more particularly true of several of the witnesses called on behalf of the Government than of those called on behalf of protestants, as is indicated more particularly by their refusal to express opinions on illustrative samples offered by protestants, on the ostensible ground that they were too small, and at the same time implying that such samples were not honestly representative of what they purported to represent, in that they had been "doctored" chemically. The record shows that several samples, no larger than those so referred to as being too small, were submitted by the Government to the same witnesses and passed upon without objection as to their size. No attempt was made to prove that any of protestants said illustrative samples had been "doctored," nor was any request made for opportunity to do so, but, on the contrary, it was later testified to on behalf of protestants, and not controverted, that the samples were honestly representative of the leathers from which they had been cut.

We have examined the record with great care, and feel that the criticism by the board was fully warranted, and particularly should have been given weight in the findings of fact. While some of the testimony on behalf of the Government was directed toward the use of a commercial meaning for the term "belting leather," the greater portion of that testimony was directed more to the point that these importations, by reason of their condition, were not suitable for certain belting purposes. The Government sought to confine the definition of a belt and of belting leathers to that suitable only for the purpose of transmitting power from wheel to wheel or axis to axis. It was asserted by the witnesses that the necessary characteristics of such belting leather were firmness, pliability, tensile strength, and freedom from stretching—qualities which might be present in apron leather, which they had characterized this importation, but in an entirely different degree, and that this importation did not possess

such qualities in a sufficient degree. It may be fairly said within the record that the great bulk of this importation is bought and sold as apron leather, which is leather suitable and intended to be used in the making of conveyors for the purpose of transporting materials and not power from point to point.

While there was, as stated by the general appraiser sitting, "singular uniformity" in the testimony of the witnesses on behalf of the Government that belting leather was only that suitable for use in making belts to transmit power from point to point, there was great variance in that testimony as to the requisite degree of firmness, pliability, tensile strength, and stretch necessary to include the merchandise in the term belting leather.

It is apparent and all the witnesses agreed that, whatever the use, these qualities vary in a great degree according to the amount of power to be conveyed and the conditions of use. It was further claimed that the oil content of the imported merchandise was properly indicative of a condition which rendered it unsuitable as belting leather. Likewise it was asserted by the Government witnesses that the chrome picker straps were too soft and liable to stretch in order to be suitable for belting leather.

In this connection, we quote from the standard authority, Procter, on "The Principles of Leather Manufacture," wherein he states:

Chrome leather belts should be kept thoroughly oiled. They have a much greater adhesion than vegetable tannages, and this is increased by oiling. Good chrome belting is much stronger than bark-tanned; and is unaffected by damp or steam, but generally stretches somewhat more.

All of which indicates that these qualities are not infallible guides.

Controverting the Government's case, the importers introduced equally qualified witnesses who testified that the term "belting leather" as used in trade and commerce was not confined to belts for the transmission of power, but includes also conveyor belts, used for the transmission of materials from point to point. In substantiation of this witnesses were introduced who produced catalogues of three different wholesale houses wherein were advertised conveyor belts. A larger number were offered on the same point, but their introduction was refused by the general appraiser sitting on the ground that "three were as good as a million."

From this record we think that it clearly appears that there is no uniform general trade meaning in this country attached to the words "leather belting" which confines it to that class of leather suitable for making belts for the transmission of power, and that the term as used by Congress is so used in its ordinary acceptance.

The question is whether or not this merchandise is included within the general scope of the terms "band, bend, or belting leather."

The term "band leather" is unknown to the leather trade. Having been inserted in the statute, it must therefore be given its natural

signification, which would be leather from which bands are made or leather prepared for making bands.

The testimony shows that a "bend of leather" is known in the leather trade. It refers to a section of the hide from which leather is made. Two "bends" make a "butt," and a butt is half a hide trimmed.

A "bend" is defined by the Oxford Dictionary as follows:

*Bend*.—A shape or size in which ox- or cow-hides are tanned into leather, forming half of a "butt."

"Bend-leather" as defined by the same authority is as follows:

*Bend-leather*.—The leather of a "bend," i. e., the thickest and stoutest kind of leather (from the back and flanks), used for soles of boots and shoes; sole-leather.

The Standard Dictionary, twelfth edition, gives essentially the same definition of a bend. "Bend-leather" is stated to be "sole-leather."

The Century Dictionary and Cyclopedia defines a "bend" as follows:

*Bend*.—A name in the leather trade for a butt or rounded crop cut in two; the half of a hide of sole-leather that was trimmed and divided before tanning.

Bend-leather as defined by the same authority is as follows:

*Bend-leather*.—The strongest kind of sole-leather for shoes.

"Bend" seems in the leather trade to refer to a section of the hide. "Bend-leather" seems to be confined to leather taken from the section of the hide called the bend. It is half of a butt and includes the main portions of the hide when rounded or trimmed.

Indeed some of the witnesses for the Government by inadvertent reference spoke of conveyors as "conveyor belts," and of "apron belts."

From an examination of the lexicographic definitions and the cited instances of the use of the words "band," "bend," and "belt," as known in the leather trade and in common parlance, together with their use in various acts of Congress from 1842 to and including the act of 1909, it would seem that they are essentially coextensive terms. All of the lexicographic authorities, in one place or another, use the words "band," "bend," and "belt" interchangeably when referring to certain senses of the use of these words. We do not find it necessary, however, in this case to attempt precise definitions of the words "band" and "bend" as used in the tariff act of 1909 and applicable to this importation.

The main contention below was that this merchandise was within the term "belting leather" as used in the act, and that was the ultimate conclusion of the Board of General Appraisers. In this we think the board did not err. This record convinces us that the term "belting leather" as used in the tariff act of 1909 was used in a descriptive



sense, and that in common nomenclature conveyor belts are equally belts with those for the transmission of power, and that the term "belting leather" as used in the tariff act of 1909 includes equally leather suitable for use as power and as transmission belts.

We are not unfamiliar with the common understanding of elevator belts used in grain and other elevators for the transmission of grains, and not power, from one point to another. The common use of the term in that sense finds a very minor expression in the case cited in the Oxford Dictionary from Harper's Magazine, where, in an article upon American flour mills, the expression is used, "It empties itself into conveyers consisting of small buckets travelling on an endless belt."

The letters patent of the particular conveyors in question, issued by the Patent Office at Washington, describe the precise article made from these importations as a "conveyor belt."

Whilst these very slight evidences are of small weight, they are nevertheless corroborative of what we deem the common understanding of that term.

It is no doubt true that in mechanics, and strictly speaking, a belt is confined to an instrument for the transmission of power, but that even is not confined to a leather belt, as all the lexicographic definitions will show. "Belt" is a generic term, the function of which differs greatly according to the use to which it is put. Primarily it is the well-known band around the waist, of whatever material composed; in its secondary sense it includes a band or strip, joined at the ends, usually longer than it is wide, and employed in a variety of purposes, such as belts in the primary sense above mentioned. Belts for the conveyance of power, and extending to and not excluding therefrom belts for the transmission from point to point of motion and materials, of which the articles for the manufacture of which these importations are the materials are a prominent, extensive, and well-understood class.

In *United States v. Horrax* (T. D. 31187; 1 Ct. Cust. Appls., p. 142) this court held that certain bands used in cigarette machines for the transmission of tobacco from point to point were belts. It was contended in that case that they were not such, because belts were used only for the transmission of power from point to point.

We can not see any reason for assigning to Congress a purpose of differentiation between the conveyor belt and a power belt, or the leather out of which they are made. The leather is essentially of the same character, made from the same grade and weight of hides, tanned in essentially the same process, but finished of varying degrees of flexibility, according to the particular use intended. In some cases the power belt is finished hard and stiff; in others soft and more pliable. In many instances they are interchangeable in use. Conveyor belts are of the softer and more pliable kind. They

are both for use by the same manufactures, and frequently, if not always, upon the same machine. They are made from the same class of hides and from the same part of the hide, always including, if not wholly of, the bend.

To hold otherwise than did the board here would be to adopt the finesse of scientific, mechanical differentiation rather than the plain, common understanding of terms used other than in a commercial sense.

While the words band, bend, and belting leather, from the somewhat uncertain lack of use of the words in that trade, can not in their application be fixed to a certainty, we think that the natural scope of these words is in exact accord with the manifest intention of Congress for almost a hundred years to classify and make dutiable at the same rate all grades of heavy bovine leathers which is indicated by the different tariff acts. We find nothing in this record which conduces to the conclusion that the Board of General Appraisers here erred either in the findings of fact or conclusions of law.

*Affirmed.*

MONTGOMERY, Presiding Judge, and SMITH and BARBER, Judges, concur.

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LENT v. UNITED STATES (No. 420).<sup>1</sup>

FANCY BRASS-PLATED VEST BUTTONS SET WITH IMITATION STONES.

The importation was of buttons made of brass, plated, and some of these were studded with imitation precious stones. To bring these buttons within the provisions of paragraph 448, tariff act of 1909, they should be found to be either dress buttons set with imitation precious stones composed of glass or paste, or brass should compose their value in chief, or they should be designed for personal adornment, and in any of these cases be valued in addition at not less than 20 cents per dozen. This importation on examination appears to fall within the provisions of paragraph 448, tariff act of 1909, and giving the collector's decision the benefit of the presumption of correctness to which it is entitled, the goods are dutiable under that paragraph.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 23614 (T. D. 30754).

[Affirmed.]

*Walden & Webster* (Henry J. Webster of counsel) for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector at the port of New York classified certain buttons as dress buttons and assessed them for duty under the provisions of

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<sup>1</sup>Reported in T. D. 31549 (20 Treas. Dec., 888).

paragraph 448 of the tariff act of 1909, the material parts of which read as follows:

448. Chains, pins, collar, cuff, and *dress buttons*, charms, combs, millinery and military ornaments, together with all other articles of every description, finished or partly finished, if set with imitation precious stones composed of glass or paste (except imitation jet), or composed wholly or in chief value of silver, German silver, white metal, brass, or gun metal, whether or not enameled, washed, covered, plated, or alloyed with gold, silver or nickel, and designed to be worn on apparel or carried on or about or attached to the person, valued at twenty cents per dozen pieces, one cent each and in addition thereto three-fifths of one cent per dozen for each one cent the value exceeds twenty cents per dozen; all stampings and materials of metal (except iron or steel), or of metal set with glass or paste, finished or partly finished, suitable for use in the manufacture of any of the foregoing articles, \* \* \* valued at seventy-two cents per gross, three cents per dozen pieces and in addition thereto one-half of one cent per gross for each one cent the value exceeds seventy-two cents per gross. \* \* \*

The importers objected to the classification and assessment made by the collector, and among other grounds of protest set up that the merchandise was dutiable at three-fourths of 1 cent per line per gross and 15 per cent ad valorem, or at 1½ cents per line per gross and 15 per cent ad valorem, or at 50 per cent ad valorem under paragraph 427, which reads as follows:

427. Buttons or parts of buttons and button molds or blanks, finished or unfinished, shall pay duty at the following rates, the line-button measure being one-fortieth of one inch, namely: Buttons known commercially as agate buttons, metal trousers buttons (except steel), and nickel bar buttons, one-twelfth of one cent per line per gross; buttons of bone, and steel trousers buttons, one-fourth of one cent per line per gross; buttons of pearl or shell, one and one-half cents per line per gross; buttons of horn, vegetable ivory, glass, or metal, not specially provided for in this section, three-fourths of one cent per line per gross, and in addition thereto, on all the foregoing articles in this paragraph, fifteen per centum ad valorem; shoe buttons made of paper, board, papier-mâché, pulp or other similar material, not specially provided for in this section, valued at not exceeding three cents per gross, one cent per gross; snap fasteners, or clasps, or parts thereof, by whatever name known, fifty per centum ad valorem; buttons of metal, embossed with a design, device, pattern, or lettering, forty-five per centum ad valorem; buttons not specially provided for in this section, and all collar or cuff buttons and studs composed wholly of bone, mother-of-pearl, or ivory, fifty per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed to this court. On the hearing before the Board of General Appraisers no evidence was introduced by the importers or by the Government other than the official samples and the usual official documents. The appraiser returned the merchandise as dress buttons valued at over 20 cents per dozen, and in the answer of the deputy appraiser to the protest the goods are reported as "fancy vest buttons made of brass, plated, some of which are studded with imitation precious stones."

To bring the imported articles within the provisions of the paragraph under which they were assessed they must be, first, dress buttons; second, dress buttons either set with imitation precious

stones composed of glass or paste (except imitation jet), or dress buttons composed wholly or in chief value of silver, German silver, white metal, brass, or gun metal; third, they must be designed to be worn on the apparel or carried on or about or attached to the person; and, fourth, they must be valued at not less than 20 cents per dozen pieces.

An examination of the official samples, two in number, discloses that one of the buttons is composed of an imitation moss agate set in a metal frame, about one-half inch in diameter, to which frame is attached a looped metal shank. The other appears to be a button made up of a metal frame about one-half inch in diameter, in which is set a round pearl shell center inclosed by a golden-colored metal ring, which, in its turn, is encircled by a narrow band of black vitreous material divided into eight equal sections by very small bright metallic strips. A looped metal shank is fixed to the metal frame and the pearl-shell center has four imitation button eyes sewed with metal strands. From this inspection we must conclude that both samples are fancy buttons, which, while serving a useful purpose, are designed to embellish the attire and to be worn upon the apparel principally for their ornamental effect.

Paragraph 448 appears to be confined to articles of personal adornment, and it would seem therefore that by "dress buttons" was meant just such buttons as those under consideration. If the term "dress buttons" does not mean a fancy button—a button intended to adorn or ornament the dress—a button designed for something more than mere utility, it is hard to see just what meaning consistent with paragraph 427 could be given to it. If the signification contended for by the importer is given to it, namely, buttons worn on ladies' dresses, then all buttons so worn would become dutiable at a rate different from that of the very same class of button not so worn. With such an interpretation a high-priced, beautifully finished, and very ornamental button appropriate for men's apparel alone would carry a lower rate of duty than a common, ordinary button designed exclusively for women's dresses. When Congress provided for dress buttons we can not believe that it intended to make any such distinction. In our opinion, the buttons which are the subject of appeal are dress buttons designed to be worn on the apparel. Some of them are set with imitation precious stones, and giving to the collector's decision the benefit of the presumption of correctness to which it is entitled all of them are composed in chief value of brass and valued at more than 20 cents per dozen pieces. They are therefore dutiable as assessed, and the decision of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and HUNT, BARBER, and DE VRIES, Judges, concur.

STINER & SON *et al.* v. UNITED STATES (No. 453).<sup>1</sup>

## 1. DRESSED LAMBSKINS.

Dressed lamb and kid skins finished so as to be suitable for making gloves might be designated as either "lambskins dressed and finished" or as "glove leather"; but as the last is the more specific designation it must prevail, and the more certainly since otherwise it would be to deny any significance to "glove leather" in the law. The importation is not dutiable as sheep and goat skins (including lamb and kid skins) dressed and finished under paragraph 451, tariff act of 1909, nor as grain, split, or buff leather under paragraph 450 of that act, but is dutiable as glove leather under paragraph 451.

## 2. ERROR WITHOUT INJURY.

It was error for the board to predicate an opinion on testimony taken in a former case, but as the error relates to a question of fact not essential to the decision of this case, it is error without injury.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, G. A. 7064 (T. D. 30766).

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

In the months of August and October, 1909, the appellants imported into this country a number of consignments of dressed and finished lambskins. The collector classified them as "glove leather" and held them to be dutiable at 20 per cent ad valorem, under paragraph 451 of the act of 1909.

The appellants duly filed their protest to this ruling, and claimed that such of the importations as had entered before October 1 were dutiable at 15 per cent ad valorem as "lambskins dressed and finished" under paragraph 451, and that such as had entered after October 1 were dutiable at 7½ per cent ad valorem as "grain leather" under paragraph 450 of the same act.

The Board of General Appraisers heard the protest upon evidence, and held with the collector. The appellants now present the question to this court and pray for a reversal of the board's decision.

The paragraphs which are above referred to read as follows:

450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, grain, buff, and split leather shall pay a duty of seven and one-half per centum ad valorem; that all boots and shoes, made wholly or in chief value of leather made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species, including calfskins, shall pay a duty of ten per centum ad valorem; that harness, saddles and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of twenty per centum ad valorem.

<sup>1</sup> Reported in T. D. 31550 (20 Treas. Dec., 891).

451. Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem; chamois skin, twenty per centum ad valorem; skins for morocco, tanned but unfinished, five per centum ad valorem; patent, japanned, varnished, or enameled leather weighing not over ten pounds per dozen hides or skins, twenty-seven cents per pound and fifteen per centum ad valorem; if weighing over ten pounds and not over twenty-five pounds per dozen, twenty-seven cents per pound and eight per centum ad valorem; if weighing over twenty-five pounds per dozen, twenty cents per pound and ten per centum ad valorem; pianoforte leather and pianoforte-action leather, and glove leather, twenty per centum ad valorem; leather shoe laces, finished or unfinished, fifty cents per gross pairs and ten per centum ad valorem; boots and shoes made of leather, fifteen per centum ad valorem: *Provided*, That leather cut into shoe uppers or vamps or other forms, suitable for conversion into manufactured articles, and guaffre leather, shall pay a duty of ten per centum ad valorem in addition to the duty imposed by this paragraph on leather of the same character as that from which they are cut.

It will be observed that the foregoing paragraphs make separate classes of "grain leather" dutiable at  $7\frac{1}{2}$  per cent ad valorem after October 1, 1909, and "lambskins dressed and finished" dutiable at 15 per cent ad valorem, and "glove leather" dutiable at 20 per cent ad valorem; and the only question upon the merits is, To which of these three classes do the importations belong? There is also a question of procedure made in the case by a ruling of the board excluding certain testimony proposed by appellants, to which ruling appellants excepted. That question will be considered later in this opinion.

There are certain relevant facts which may be stated as being either conceded by the parties or as being established by the proofs beyond serious controversy.

The importations are all lambskins. The skins are all so dressed and finished as to be fit and suitable to be made into gloves. They are soft, elastic, and pliable, which are characteristics always present in glove leather. In the trade such skins were frequently called simply lambskins, although that name if used alone would hardly describe them with sufficient particularity to serve as an order or invoice. The name "glove leather" was also frequently used by the trade as applicable to the skins, but this, too, lacked definiteness and required further description to serve as an order or invoice. These names were not strictly trade names of a definite or exclusive character; the articles were called lambskins because they were the skins of lambs, and they were called glove leather because they had been tanned, finished, and dressed to be suitable for the making of gloves. Such names were therefore quite as apt to be used by laymen as by experts of the trade. There were also various subsidiary names applied to the skins, indicating different conditions produced by dressing and finishing, such as suede, nappa, glace, kid, and chamois. These were

real trade names and had definite and specific meanings which were well known to all engaged in the business.

More than half of all the lambskins used in manufacture are used in the making of shoes. Those so used are dressed and finished in a different manner from these at bar, the leather for shoes requiring a firm surface, while glove leather must be soft and flexible. The two kinds of leather are therefore clearly distinguishable from one another.

Of the lambskins finished for gloves a small fraction, perhaps 10 per cent, are in fact finally used in the making of other articles, such as jewelry bags, ladies' belts, pocketbooks, and bookbindings. But this use is relatively so small that the skins so prepared are nevertheless all called glove leather, notwithstanding the fact that some might actually be used for other purposes.

On the other hand, leather gloves are not all made of lambskins. The skins of dogs, goats, sheep, deer, colts, and pigs are also used for this purpose. However, the proportion of such other skins used in glove manufacture is so small that probably more than 90 per cent of leather gloves are made from lambskins and less than 10 per cent from all others combined.

It appears from these statements that the skins in question might aptly be called by either of two of the designations contained in paragraph 451—that is, "lambskins dressed and finished" or "glove leather"—and that they were in a general way known to the trade by each of these titles. The third classification, namely, "grain leather," provided for by paragraph 450, will be considered later.

As between the two classifications above named that one must prevail which is the more specific and which seems upon the paragraph at large to carry more nearly into effect the legislative intent.

Which, then, is the more specific designation "lambskins dressed and finished" or "glove leather"?

The primary term denominative of the articles is lambskins, but this term alone does not describe either of the two classes as named in the paragraph. The one class requires that the skins shall be dressed and finished before they shall be included within it; the other class requires that they shall also be glove leather before they shall be included within it. That is to say, in order to come within the one class the lambskins need simply to be dressed and finished: but in order to come within the other class they must be dressed and finished in a particular manner, namely, for glove leather. The former classification is therefore the more comprehensive. The latter engrafts an important limitation upon it, and is the more specific of the two. For, as has been stated, not more than half of all the lambskins which are dressed and finished are made into glove leather. The latter class is therefore but a subdivision of the former. Therefore as between these two designations glove leather must prevail.

In the paragraph the words "not specially provided for in this section" follow and modify the provisions for "lambskins dressed and finished," no such provision being added to the clause relating to glove leather. This also tends to sustain the argument that glove leather was regarded as a class or subdivision of lambskins dressed and finished, for it is fully consistent with such a claim but inconsistent with the claim that so large an exception as lambskins had been made in the section to the class composed of glove leather.

The appellants also contend that the importation entering after October 1, 1909, was composed of lambskins so treated as to be "grain leather," and therefore dutiable as such at  $7\frac{1}{2}$  per cent ad valorem under the provisions of paragraph 450. They contend that grain leather was a trade term used to designate all leather which was dressed and finished so as to preserve the grain or hair side of the skins, and that the importation referred to belonged to that class.

Having determined that glove leather is more specific than lambskins dressed and finished, the former classification must now be compared with grain leather. For this purpose only appellants' definition of the term will be used. A comparison of these terms with reference to this subject matter discloses them to be cross divisions, and makes it difficult to determine which is the more specific of the two, although appellants' definition of grain leather makes that class a very general and comprehensive one. But one very important question immediately suggests itself, and that is whether the provision relating to grain leather in paragraph 450 is not limited to such leather as is made from the hides of cattle. If so, it would have no application to this case. That paragraph will be copied again in order to present the question which is now suggested:

450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, grain, buff, and split leather shall pay a duty of seven and one-half per centum ad valorem; that all boots and shoes, made wholly or in chief value of leather made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species, including calfskins, shall pay a duty of ten per centum ad valorem; that harness, saddles and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of twenty per centum ad valorem.

However, it is not necessary to decide that question in this case, for the present decision does not really depend upon its answer, there being other sufficient grounds upon which to predicate it. It appears that another case involving that question is upon the docket and will be submitted to the court at a later term; and it seems right to hear the arguments in that case upon this question before its final decision.

The consideration which seems conclusive upon the issue between glove leather and grain leather, as well as lambskins dressed and finished, is the effect which either construction would have upon the paragraphs at large. Glove leather is made dutiable at 20 per cent ad



valorem. If all grain leather and all lambskins are ruled out of that classification there would be practically nothing left within it. More than 90 per cent of glove leather is made up of lambskins dressed and finished, leaving less than 10 per cent remaining; and this residue would practically all be grain leather, according to appellants' definition of that term; so that if lambskins and grain leather be both subtracted from the classification it would be destroyed. Such an interpretation is unreasonable and its adoption would not be justified by a comparison of the various parts of the two paragraphs.

Upon the merits of the case the decision of the board should therefore be affirmed, and this leads to a consideration of the question of evidence saved by the exceptions of the appellants.

The witness Henry M. Van Houten was called by appellants and examined in chief as their witness. He testified that he was the examiner of merchandise at the port of New York and as such passed upon harness, sporting goods, and saddles, including pigskin saddles. He was then asked by appellants to state, "Under what paragraph of the act are you classifying such merchandise if the importation was made subsequent to October 1, 1909?"

The Government objected to this question, and the objection was sustained, to which appellants excepted. The appellants thereupon proposed to state as part of the record the answer which they expected the witness to make to the question; this was ruled out by the board, to which appellants again excepted.

This latter ruling is not consistent with approved procedure. Where a question is propounded to a witness, and the board sustains an objection to it, the party putting the question should be allowed to state the answer which he expects the witness to give. The object of this is to enable the reviewing court to determine whether the testimony would be substantial and relevant. The question itself may not always be sufficient to indicate this. However, in this case no prejudice resulted from the method of procedure adopted by the board, because the question is plainly irrelevant and no competent answer could be given to it. The question called for certain acts of the witness which were only pertinent in that they tended to show his interpretation of the law relating to the duty upon certain articles which were not included within the importation. For both these reasons the question could not be other than incompetent.

It may also be noted that the answer expected from the witness is practically incorporated within the record by the stenographer's copy of counsel's question and proposal. Therefore, this question of procedure assumes no importance in the case.

It seems proper to add an additional comment upon the procedure adopted by the board in its trial and decision of the case. The appellants had made the claim that the importation of October 5

was composed of grain leather, and that it was dutiable as such at 7½ per cent ad valorem under paragraph 450. Testimony was introduced by appellants at the hearing tending to sustain their claim that the leather was so known in the trade. The board, however, decided that the leather was not grain leather and predicated their decision upon testimony which had been taken in a former case and which was not introduced in this case at all and probably is not saved in any obtainable form. Such testimony is at least no part of this record. Appellants assign this procedure of the board as error, and it is very obvious that such procedure was erroneous. This court can not review the proceedings of the board if the board's decision is to be made upon testimony not incorporated in the record.

However, in this case the error, though very palpable, is not prejudicial, because it relates only to the question of fact as to whether the importation was grain leather or not, and that question is not essential to the decision of the case. For even assuming that the importation was grain leather, nevertheless it was also glove leather, and the latter classification prevails for the reasons above given.

The decision of the board is therefore *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, BARBER, and DE VRIES, Judges, concur.

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PROSSER & SON v. UNITED STATES (No. 488).<sup>1</sup>

1. PARTLY OR FULLY MACHINED ARTICLES.

Steel articles that have been either fully machined or that are rough in part and fully machined in part, are something more than forgings and the term "forgings" can not be taken properly to apply here; they are articles of steel partly or wholly manufactured and were dutiable as such under paragraph 193, tariff act of 1897.

2. PISTON RODS OF STEEL.

Steel piston rods which have been rough machined and not further advanced than close forged, remain forgings of steel and were dutiable as forgings of steel under paragraph 127, tariff act of 1897.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from United States Circuit Court for Southern District of New York (177 Fed. Rep., 569; T. D. 30340).

*Brown & Gerry* for appellants.

*D. Frank Lloyd*, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court.

Thomas Prosser and Richard Prosser, trading as Thomas Prosser & Son, imported at the port of New York certain articles of steel which were invoiced and entered as follows:

One steel crank shaft, weighing 32,526 kilograms; 2 steel connecting rods, weighing 11,944 kilograms; 2 steel connecting rods, weighing

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<sup>1</sup> Reported in T. D. 31551 (20 Treas. Dec., 896).

1,036 kilograms; 2 steel crank pins, weighing 176 kilograms; 2 steel crossheads, weighing 2,364 kilograms; 3 steel piston rods, weighing 654 kilograms; 2 steel piston rods, weighing 4,358 kilograms; 2 steel piston rods, weighing 1,808 kilograms; 2 steel piston rods, weighing 2,601 kilograms; 2 steel crank axles, weighing 381 kilograms.

The collector classified these articles as manufactures of metal not specially provided for and assessed them for duty under the provisions of paragraph 193 of the tariff act of July 24, 1897, which reads as follows:

193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

To the classification made by the collector and the duties assessed the importers objected and by protest duly presented set up the claim that the importation was properly dutiable as forgings either under paragraph 127 or paragraph 135 of the tariff act, which paragraphs are as follows:

127. Iron or steel anchors or parts thereof, one and one-half cents per pound; forgings of iron or steel, or of combined iron and steel, of whatever shape or whatever degree or stage of manufacture, not specially provided for in this act, thirty-five per centum ad valorem; anti-friction ball forgings of iron or steel, or of combined iron and steel, forty-five per centum ad valorem.

135. Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act, all of the above valued at one cent per pound or less, three-tenths of one cent per pound; valued above one cent and not above one and four-tenths cents per pound, four-tenths of one cent per pound; valued above one and four-tenths cents and not above one and eight-tenths cents per pound, six-tenths of one cent per pound; valued above one and eight-tenths cents and not above two and two-tenths cents per pound, seven-tenths of one cent per pound; valued above two and two-tenths cents and not above three cents per pound, nine-tenths of one cent per pound; valued above three cents per pound and not above four cents per pound, one and two-tenths cents per pound; valued above four cents and not above seven cents per pound, one and three-tenths cents per pound; valued above seven cents and not above ten cents per pound, two cents per pound; valued above ten cents and not above thirteen cents per pound, two and four-tenths cents per pound; valued above thirteen cents and not above sixteen cents per pound, two and eight-tenths cents per pound; valued above sixteen cents per pound, four and seven-tenths cents per pound.

The protest was heard by board 2 of the Board of General Appraisers, which decided to sustain the claim of the importers. After the decision was signed, but before it was announced, the conclusion reached was challenged by a general appraiser not a member of the

board which passed upon the protest. This resulted in the submission of the whole matter to the full board of nine general appraisers, a majority of which held to the opinion that the protest should be overruled and transferred the case to board 1 for that purpose. Board 1, notwithstanding the fact that its jurisdiction was challenged by the importers, reheard the matter, and after taking additional testimony upheld the classification and assessment of the collector. From this ruling an appeal was taken to the United States Circuit Court for the Southern District of New York, which sustained the jurisdiction of board 1 and affirmed its decision, overruling the protests. The case was then taken on appropriate appellate proceedings to the Circuit Court of Appeals, Second Circuit, which decided that board 1 had no jurisdiction of the subject matter. Accordingly the record was remanded to board 2, which on the evidence taken by it and on that subsequently introduced before board 1 and in the circuit court sustained the protests and directed a reliquidation of the entries at 35 per cent ad valorem under the provisions of paragraph 127. From this decision both parties appealed, the Government on the ground that the wares were manufactures of steel and therefore dutiable as assessed, and the importers on the ground that as forgings the importation was more appropriately dutiable under paragraph 135 than under the paragraph selected by the board. The Circuit Court for the Southern District of New York, Judge Martin presiding, reversed the board and sustained the collector, and from this decision the importers now appeal to this court.

The issue raised by the appeal is one of definition. The Government contends that the articles are not forgings, first, because they are not known as such to the trade, and, second, because they have passed beyond the forging process and have become articles of steel, partly or wholly manufactured, within the meaning of paragraph 193. On their part the importers urge, first, that "forgings" has no definite, uniform, or general commercial meaning; second, that the articles are "forgings of steel" within the ordinary, common signification of the term; and, third, that in any event, the words of extension "of whatever shape or whatever degree or stage of manufacture" having been made applicable by Congress to "forgings of steel" subsequent to the decision in *Saltonstall v. Wiebusch* (156 U. S., 601), the wares are "forgings" as defined in that case.

As appears from the evidence, forgings of steel are made from ingots of that metal. These ingots, which are usually twice the size of the finished article, are heated to the proper temperature in the forge shop and there beaten, hammered, or pressed to the general form and approximately to the size required. The article is then said to be "rough forged," and at least to some of the trade is known as a

"rough forging." In earlier years very close work was done with the hammer, and a forging was brought by that process alone to within an eighth of an inch of actual dimensions. That point reached, however, further work with the hammer was suspended and the product was reduced to true size, smoothed off, polished, and finished by other processes. Forging close, however, was not only costly, but was open to the objection that it was attended with the danger of spoiling the forging by a blow too many. With the development of improved methods and high-class machinery it was found that more economical, better, and speedier results could be achieved by not trying to forge close or to remove in the forge shop surplus metal from places not readily accessible. Accordingly in these modern times a forging is rarely hammered to less than a quarter of an inch of the size desired, and the removal by forging methods of excess material difficult to reach is not attempted. To reduce the forging to approximate dimensions and to get rid of surplus metal inconveniently located, the forging is now rough machined or rough turned, and by lathe, slotting machine, or turning mill is attained that which was once accomplished by hammer and anvil. Rough turning or rough machining is more a substituted than an additional process and has for its aim rather the finishing of the forging than the completion of the article to be evolved from the forging. The rough-machined or rough-turned article must still be finish machined or turned and for all practical purposes has not been advanced beyond the stage of a close forging. It may be said, therefore, that rough machining or rough turning does the work of close forging and accomplishes its objects by less costly and tedious means. After rough machining the forging is known to some of the trade either as a "rough turned," "rough machined," or "partially machined" forging, and to others as the rough turned, rough machined, or partially machined article which it is proposed to manufacture. But by whatever name it is known, the sense conveyed by it is that of crudity and roughness. Indeed, no other designation would be appropriate considering that the product still bears upon it the scars and marks of the turning or machining tool employed upon it. After rough turning or rough or partial machining, the forging is finish machined; that is, it is brought to true dimensions and then smoothed off or polished. It is then prepared to be fitted in place. Once finish machined, the product is called by some of the trade a finished machined forging and by others a finished machined shaft, crank pin, piston rod, crosshead, or connecting rod, as the case may be.

From all of this it is evident that "forgings" is not a trade designation and that to it attaches no such definite, uniform, and general commercial meaning as would make that meaning a controlling factor in fixing the classification of the importation under consideration.

The common, ordinary meaning of the word must therefore determine whether the wares in controversy fall within the category of forgings. "To forge" originally meant the hammering or beating of heated metal to shape or form and the production thereby of an article high in tensile strength and capable of resisting strain. In time the hydraulic press, the rolling mill, and other methods came into use to secure the same or similar purposes. A forging, as now commonly understood, may therefore be defined to be a creation of forging processes; an article of metal shaped or formed by hammering or by allied methods producing substantially the same results as hammering.

It is not disputed that all the articles are either fully machined or partly rough machined and partly finish machined, with the exception of the piston-rod forgings, which are rough machined only. As already indicated, we consider rough machining or rough turning as a mere incident to the forging process and as much a refinement in forging as the use of the hydraulic press or rolling mill or the use of a boring machine instead of a mandrel in making hollow forgings. In this view we are strengthened by the circumstance that Congress could hardly have intended to limit importations of forgings to "rough forgings," a commodity which is rarely if ever imported, for the reason that by ordering rough machined or rough turned forgings the importer secures, for all practical purposes, a close forging, pays for less metal, and is to some extent insured against flaws or defects. We are therefore constrained to hold that the piston rods, not being further advanced than if they had been close forged, are forgings of steel and dutiable as such. The case of *Saltonstall v. Wiebusch* (156 U. S., 601) is not in conflict with this conclusion. That case did not hold that the mere perfection of a forging or the accomplishment by new methods of a result formerly exclusively secured by a careful use of the hammer advanced the stage of manufacture. True, the court did say, "We do not understand the term 'forgings' to be applicable to articles which receive treatment of a different kind than hammering before they are complete," but that language must be considered as referring to the grinding, tempering, and polishing to which the articles there under consideration had been subjected and by which grinding, tempering, and polishing results were obtained not obtainable by the forge master. Moreover, in the very same case the court expressly stated that "It would seem that Congress intended \* \* \* to apply the term 'forgings,' though perhaps not exclusively, to such articles as are completed by the action of the hammer." Indeed, if forgings were limited to those produced by the hammer, in what category would be placed the products of the hydraulic press and the rolling mill?

We think the wares which have been either fully machined or partly rough machined and partly fully machined have advanced

beyond the stage of forgings and are in a condition which was not produced and could not be accomplished by hammer, press, or allied methods. Consequently they are something more than forgings. Castings advanced beyond the casting process cease to be castings. *Bromley v. United States* (156 Fed. Rep., 958); *Prosser v. United States* (1 Ct. Cust. Appls., *supra*, p. 22; T. D. 30848; 1 Ct. Cust. Appls., *supra*, p. 29; T. D. 30850). Forgings advanced beyond the forging process by a parity of reasoning cease to be forgings.

The fact that the statute provides for forgings of whatever shape and whatever degree or stage of manufacture does not warrant the conclusion that Congress intended to give a broader meaning to the word "forgings" than that commonly understood, and much less that any article which had been once submitted to a forging process thereby became a forging for all time, whatever might be the manufacturing processes to which it might be subsequently submitted. Such an interpretation would make a goodly portion of the metal schedule so much useless surplusage, a result which it is evident the legislature did not intend to bring about. The terms of extensions in paragraph 127, if they mean anything, mean the inclusion of treatment purely incidental to the forging and not designed to advance the product beyond the forging stage. Of course, commerce and trade might have given to "forgings" the broad meaning contended for by the importers, but as they admit that trade usage has not been so definite, uniform, and general as to give the word a commercial meaning different from its ordinary signification, that contention must fail.

Paragraph 122 of the tariff act of 1894 made provision for steamer, crank, and other shafts, wrist and crank pins, connecting rods, and piston rods. Paragraph 135 of the tariff act of 1897, which is the successor of paragraph 122, omitted that provision, and it can hardly be claimed that the articles mentioned are assessable for duty as provided in the prior enactment. Had there been any purpose to retain partially manufactured piston rods, connecting rods, and so forth, under paragraph 135, it seems reasonable to infer that the provision for them would not have been stricken out, but modified to that extent. Crossheads and crank axles are not steel in any shape or form within the meaning of paragraph 135.

In our opinion the piston rods are dutiable as forgings under paragraph 127, and the rest of the importation under paragraph 193 as articles of steel partly or wholly manufactured.

As to the piston rods the judgment of the circuit court is therefore *reversed* and in all other particulars it is *affirmed*.

MONTGOMERY, Presiding Judge, and BARBER, Judge, concur. DE VRIES, Judge, having participated in the decision of the Board of General Appraisers, did not sit.

SHALLUS v. UNITED STATES (No. 535)<sup>1</sup>

## 1. STATUTORY CONSTRUCTION.

It is true the latest clear expression of legislative intention controls in construction, but it is true also that reasonable effect should be given to all parts of the statute under consideration and regard will be had for the presumption that where a law has received an executive and a judicial interpretation, and is later reenacted, this interpretation was in view on reenactment.

## 2. COTTON CLOTH, FILLED OR COATED.

It would appear that Congress intended paragraph 321, tariff act of 1909, reenacting and enlarging paragraph 311, tariff act of 1897, to take the construction theretofore given it so far as it applied to the same merchandise named in each paragraph and that certain window shades and filled cloths formerly held dutiable thereunder should so continue regardless of the fact that it is possible to count the number of warp and filling threads of the basic fabric, which might, but for the specific provisions of paragraph 321, render the merchandise dutiable under paragraph 315.

## 3. "COTTON CLOTH" IN PARAGRAPH 320, TARIFF ACT OF 1909, DEFINED.

The words cotton cloth or cloth, wherever used in paragraph 320, tariff act of 1909, have the same meaning the first clause of that paragraph declares they shall have when applied to other paragraphs, Schedule I of that act.

United States Court of Customs Appeals, April 24, 1911.

APPEAL from a decision of the Board of United States General Appraisers, Abstract 24263 (T. D. 31070).

*T. Spence Crenney* for appellant.

*D. Frank Lloyd*, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved in this case is cotton cloth which has been subjected to several coats of paint until the interstices of the cloth are completely filled, giving it an appearance somewhat similar to oilcloth. It appears to be known in trade as Lancaster window-blind cloth. The collector assessed the merchandise as cotton cloth, filled or coated, under paragraph 321 of the tariff act of August 5, 1909, the pertinent provisions of which are as follows:

321. Cloth, composed of cotton or other vegetable fiber and silk, whether known as silk-striped sleeve linings, silk stripes, or otherwise, of which cotton or other vegetable fiber is the component material of chief value, eight cents per square yard and thirty per centum ad valorem: *Provided*, That no such cloth shall pay a less rate of duty than fifty per centum ad valorem. Cotton cloth filled or coated, all oilcloths (except silk oilcloths and oilcloths for floors), and cotton window Hollands, three cents per square yard and twenty per centum ad valorem; tracing cloth, five cents per square yard and twenty per centum ad valorem.

The Board of General Appraisers affirmed the decision of the collector.

<sup>1</sup> Reported in T. D. 31552 (20 Treas. Dec., 902).



The importer contended before the board and here that the merchandise is dutiable under paragraph 315 when read in connection with paragraph 320 of the same act. The material portions of these respective paragraphs are as follows:

315. \* \* \* Cotton cloth, exceeding fifty and not exceeding one hundred threads to the square inch, counting the warp and filling, if dyed, colored, stained, painted, or printed, and valued at not over twelve cents per square yard, not exceeding six square yards to the pound, two and three-fourths cents per square yard; \* \* \*

320. The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or cut in lengths, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practical means, and shall not include any article, finished or unfinished, made from cotton cloth. In determining the count of threads to the square inch in cotton cloth, all the warp and filling threads, whether ordinary or other than ordinary, and whether clipped or unclipped, shall be counted. In the ascertainment of the weight and value, upon which the duties, cumulative or other, imposed upon cotton cloth are made to depend, the entire fabric and all parts thereof, and all the threads of which it is composed, shall be included. The terms bleached, dyed, colored, stained, mercerized, painted, or printed, wherever applied to cotton cloth in this schedule, shall be taken to mean respectively all cotton cloth which either wholly or in part has been subjected to any of these processes, or which has any bleached, dyed, colored, stained, mercerized, painted, or printed threads in or upon any part of the fabric.

The issue involved is purely one of law.

No question appears to be made that if the merchandise is not dutiable under paragraph 321 it is dutiable under that part of paragraph 315, above quoted, as claimed by the appellant.

The appellant strenuously contends that the merchandise involved in this case is painted or printed cotton cloth, as defined in the last clause of paragraph 320, and that therefore it comes within the rate determining provisions of paragraph 315 relating thereto, as above quoted.

The United States contends that paragraph 320 relates to cotton cloth not otherwise specially provided for; that the cotton cloth involved in this case is otherwise specially provided for in that it is specifically dutiable under said paragraph 321 as "cotton cloth filled or coated"; and that it is not entitled to entry as countable cotton cloth under paragraph 315.

It appears that paragraph 311 of the act of 1897, so far as applicable to the merchandise in this case, is identical with paragraph 321 of the act of 1909, and it is conceded that the act of 1897 contains no paragraph corresponding to paragraph 320. It also appears that merchandise like that involved here was uniformly classified and assessed for duty under paragraph 311 of the act of 1897, and that this classification was sustained by the Board of General Appraisers and by the courts.

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While due recognition must always be given to the rule that the latest clear expression of legislative will shall control, regard must also be had to the other rules of interpreting statutes, namely, that Congress is presumed to have legislated in view of the executive and judicial interpretation a statute has received and that effect must be given if possible to all parts of the statute under consideration.

Now, at the same time that paragraph 320 was enacted paragraph 311 was, so far as relates to this merchandise, reenacted and it was broadened to include certain oilcloths, also cotton window Hollands, which are window shades, as are the importations here, but which had been held not to be classifiable under paragraph 311 of the act of 1897 because it did not appear that the interstices of the cotton cloth base were completely filled by the ingredients used for the purpose. See *United States v. Pinney, Casse & Lackey Co.* (105 Fed. Rep., 934).

It would therefore appear that Congress intended that paragraph 311 as reenacted in paragraph 321 should, as to cotton cloth filled or coated, receive the same construction which theretofore had been given it, that cotton window Hollands not before held dutiable under the paragraph should thereafter be deemed so, and that certain oilcloths should be classifiable thereunder. We think this is indicative of a congressional intent to place in the same classification certain window shades, oilcloths, and filled cloths possessing the characteristics of opaqueness and flexibility like the merchandise here and like oilcloths, regardless of the fact that it is possible to count the number of warp and filling threads of the basic fabric.

This construction leaves ample opportunity to apply the words painted or printed to other cotton cloth dutiable under the provisions of the countable paragraphs, because it is obvious that such cloth may be painted or printed and still not be in such a condition that the interstices are completely filled or the cloth thereby rendered opaque.

We think the construction most favorable to the appellant's claim which the paragraphs under consideration can receive would be that the merchandise is properly classifiable under either paragraph 315 or 321, in which event the application of the last sentence of paragraph 481, to the effect that the highest of two applicable rates must be imposed, would seem to call for an assessment of duty under paragraph 321, but we do not put this decision upon that ground.

We hold the merchandise dutiable as cotton cloth filled, under paragraph 321, and it follows that the judgment of the Board of General Appraisers is *affirmed*.

MONTGOMERY, Presiding Judge, and SMITH, DE VRIES, and MARTIN, Judges, concur.

approved March 3, 1911, or any amendment thereof, to have a review of said decision, may, within the time fixed by said act or any amendment thereof, apply to this court for a review of the questions of law and fact included therein.

#### ASSIGNMENT OF ERRORS.

**RULE 5.** The party seeking a review of any appealable decision of the Board of General Appraisers shall file with the clerk, in duplicate, a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector or on the importer, owner, consignee, agent, or attorney, as the case may be, either by mail or by delivering the same personally to the party to be served or to his attorney, who shall have regularly appeared before said Board of General Appraisers on or before the date of such application. Such service, in case of mailing, shall be by depositing in a post office a copy of such statement in a sealed envelope plainly addressed to the party or attorney to be served at his place of business or residence, with postage thereon fully prepaid. In all cases where the United States is not the appellant such application for review shall be accompanied by the filing fee of \$6 and by a bond for costs in a sum not less than \$25.

#### MANDATE.

**RULE 6.** Upon the filing of such application for review, a mandate shall issue to said Board of General Appraisers directing said board to transmit to said court the records and evidence taken by them, together with a certified statement of the facts involved in the case and the decision thereon, together with all samples and exhibits used before them.

#### CALENDAR.

**RULE 7.** All cases transmitted to this court, whether removed from the Board of General Appraisers in response to the mandate of this court or by the transfer from the United States circuit courts of appeals, United States circuit, territorial, or district courts, shall, upon receipt of the record by the clerk, be placed upon the calendar in the order in which they are received, and such cases shall stand for hearing and submission in that order without notice; provided, the hearing of any case may be postponed for good cause shown. On motion of either party, with due notice to the other side, the court may advance on the calendar cases that are of unusual importance, or whenever other considerations of public policy make such action appear desirable.

#### RECORDS AND BRIEFS.

**RULE 8.** The appellant shall, within 14 days from the filing of such return, or within such further time as may be allowed by the court or a judge thereof at chambers, deposit with the clerk a sum sufficient to meet the cost of printing the record. As soon as the record is printed the clerk shall retain at least 15 copies for the use of the court and furnish not less than 10 copies to the appellant, who shall serve not less than 3 copies on the appellee or his counsel.

Within 14 days after the receipt of the printed record, appellant shall serve on the appellee or his counsel not less than 3 copies of his brief, and within 14 days thereafter the appellee shall serve not less than 3 printed copies of his brief with the appellant or his counsel. Both sides shall promptly file not less than 15 copies of their briefs with the clerk. Extension of the time for filing briefs for a period not exceeding 30 days may be made by stipulation, which shall become effective when filed with the clerk.

All records and briefs printed for the use of this court shall be in small pica type, 24 pica ems to the line, 35 lines to a page, leaded with four-to-pica leads. All records

and briefs shall have a suitable cover containing the title of the court and cause. Records shall be properly indexed and printed under the direction of the clerk of the court. The size of the pages of the records and briefs shall be  $9\frac{1}{2}$  inches by  $6\frac{1}{2}$  inches.

#### SESSIONS.

**RULE 9.** The court will convene during sessions at 10 a. m., and will continue its sessions until all cases on its calendar in readiness for hearing are disposed of. All motions shall be presented at the opening of court on Tuesdays, but when the court is in session for hearing causes they may be presented at the opening of court on any day of the session.

#### APPEALS, WHEN TAKEN.

**RULE 10.** The court shall be open for business on each business day of the year for the purpose of receiving applications for appeal, and on such days writs directed to the Board of General Appraisers may issue as of course, attested in the name of the presiding judge and signed by the clerk or assistant clerk. In case of a vacancy in the office of the presiding judge, they may be attested in the name of the next judge in the order of precedence as acting presiding judge.

#### AMENDMENTS—JUDGMENTS.

**RULE 11.** The court may, in furtherance of justice, permit amendments to processes or proceedings in any case, and on final hearing may affirm, reverse, or modify any ruling, decision, or conclusion of the Board of General Appraisers, or may reverse and remand for new trial or other appropriate proceeding.

#### FINAL DECISION—MANDATE.

**RULE 12.** At the expiration of 30 days after decision by the court, the court shall issue its mandate to the Board of General Appraisers for such further proceedings as shall be proper to be taken in pursuance of such determination.

#### FEES.

**RULE 13.** The fees of the clerk of the court shall be \$6 in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for final determination. There shall be paid for each certificate of admission of an attorney to practice, \$1; and for making or copying any record or other paper and certifying the same, 15 cents per folio of 100 words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is taken by the United States no payment of fees shall be required. In all other cases fees shall be paid in advance.

The fees and costs to be allowed the marshal shall be, and hereby are, fixed the same as those allowed the marshal of the Supreme Court of the United States.

#### ARGUMENTS.

**RULE 14.** Arguments shall be limited to one hour on a side, and not more than two counsel on a side shall be heard in any case except by special order of the court. The time for oral argument may be extended in the discretion of the court.

#### APPEARANCES.

**RULE 15.** It will not be necessary for the Assistant Attorney General in charge of customs cases to file a notice of appearance in this court or to serve such notice on opposing attorneys. Where the appellant is a protestant, if the petition for review is filed by a member of the bar of this court, no separate appearance as attorney will be required, but a notice of appearance shall be served on the Assistant Attorney Gen-

eral unless such appellant's attorney represented the importer before the Board of General Appraisers. Where the United States is the appellant the attorneys for the appellee shall file a notice of appearance in this court and serve a copy of such notice on the Assistant Attorney General.

APPLICATIONS FOR REHEARING.

RULE 16. No application for rehearing will be considered by the court unless the moving party, at as early a date as may be practicable and within 30 days after decision unless further time be granted, shall cause any papers upon which it is based, together with his reasons for granting the same, to be printed and 12 copies thereof filed with the clerk of this court, together with proof that a copy thereof has been served upon counsel for the opposing party. The opposing party may at any time within 10 days thereafter file with the clerk of the court his objections to the granting of the application, serve a copy thereof upon the moving party, and the question shall thereupon be deemed submitted for decision.

# INDEX.

	Page.		Page.
Administrative construction.....	280	Certificate of chamber of commerce .....	132
Affidavits, ex parte.....	404	Champagne produced in France and sold in England for export.....	404
Alcohol as a preservative.....	239	Characteristics of a "plate".....	31
Alizarin assistant.....	360	Chinese shoes or slippers.....	5
Appeals, time within which, can be taken .....	8	Chutney.....	328
Appliqu�� collarettes.....	168	Cigarette paper.....	497
Appraisement by board of three.....	484	Cigars from the Philippines.....	450
Appraisement, final.....	181	Cinematographs.....	51
Apricot pulp.....	10	Classification determined by common use....	194
Apron leather.....	537	Classifications, practice in.....	171
Artichokes, canned.....	237	Classification, when not conclusive.....	171
Artificial musk.....	166	Coal slack or culm.....	353
Artificial silk gloves.....	86	Coated cotton cloth.....	556
Asphaltum or bitumen.....	400	Coffee substitute.....	106
Bags and baskets of wistaria or rattan.....	535	Collarettes, appliqu��.....	168
Balata beltings.....	252	Collateral attack, not subject to.....	242
Balata, in similitude, india rubber.....	252	Collector's certificate, place of exportation....	220
Bamboo splits for basket-making.....	535	Colors, enamel or ceramic.....	216
Barettes of base metal.....	457	Commercial designation, evidence insuffi- cient.....	527
Barium, binoxide of.....	213	Commercial meaning, definite, uniform, and general.....	500
Baryta, precipitated carbonate of.....	90	Commercial phrase, limiting it.....	328
Baskets made of bamboo splits.....	535	Commercial usage in language.....	15, 246
Belting that is tapelike.....	142	Commissions paid a commissionnaire.....	36
Beltings, articles of dress.....	252	Commissions paid included in valuation.....	478
Berries in hermetically sealed containers.....	287	Commission to take testimony.....	276
Binoxide of barium.....	213	Concrete muguet de mal.....	126
Birch-tar oil distilled from wood.....	122	Consular samples on reappraisement.....	462
Bisque rings.....	93	Containers of liquids and semiliquids.....	465
Bitumen advanced in condition.....	400	Contract, when in invalid.....	228
Blanket protest.....	79	Cork floats.....	529
Bleacher's blue.....	104	Correction of the record.....	213
Board of Appraisers to examine samples.....	385	Corrugated galvanized iron sheets.....	115
Board of Appraisers, power to review facts....	323	Corundum ore concentrates.....	506
Bolero jackets for women.....	92	Cotton cloth.....	73
Bond for return of goods.....	53	Cotton cloth filled.....	556
Bottles, stoneware, ink.....	477	Cotton cloths.....	64
Bottles, with cut-glass stoppers.....	34	Cotton cloth with silk selvage.....	223
Bridal wreaths in chief value of metal.....	337	Cotton ladder tape for use on Venetian blinds.	374
Broken rice.....	362	Cotton linters.....	246
Building or monumental stones.....	510	Cottons figured with cord ornamentations..	73
Burial wreaths in chief value of metal.....	337	Countervailing duty.....	443
Business hours at customhouses.....	415	Countervailing duty, computed.....	242
Buttons, dress.....	542	"Country," meaning in revenue law.....	443
Cabbages, cut, partially dried, and salted ...	17	Country of actual exportation.....	404
Canned tomatoes and artichokes.....	237	Court of Customs Appeals:	
Capers.....	171	Appeal after mandate issued.....	289
Carbonate of baryta.....	90	Appraisal of goods, not in its province..	36
Cardboards, with lithographic prints.....	422	Correction of appeal.....	289
Cast-iron disks, not "plates".....	29	Motion for rehearing, necessary grounds..	320
Cast-steel grinders, "not plates".....	22	Motion for return of complete copy of evidence.....	203
Caviar.....	1	Power to remand to take testimony.....	208
Celluloid articles.....	118		
Ceramic or enamel colors.....	216		
Certificate, failure to waive.....	220		

	Page.		Page.
Court of Customs Appeals—Continued.		Flat pieces of steel not wire rods.....	494
Organization of the court.....	8	Floor-planing machines.....	226
Power to review questions of fact.....	19, 527	Food products of crushed wheat.....	437
Questions of fact, when reviewable.....	263	Foreign market value.....	454
Rehearing, lack of ground for motion.....	320	Forgings and machine articles.....	550
Reviewing questions of fact.....	263	France, reciprocity agreement with.....	426
Testimony, can not demand it be taken.....	208	French reciprocity treaty.....	146, 404
When record may not be questioned.....	213	Fresh caviar.....	1
Will not appraise goods.....	36	Fruits preserved in sugar.....	287, 328
Will not take jurisdiction in questions arising out of breach of the conditions of a bond for return of goods.....	53	Fur sheepskins not wool.....	272
Coverings.....	465	Fur, undressed scraps of.....	198
Coverings, stoneware ink bottles not.....	477	Galvanized and corrugated iron sheets.....	115
Creosote oil in metal drums.....	312	Gelatin prints.....	82
Culm or coal slack.....	353	Ginger, stem and cargo.....	113
Customs administration, proceedings in.....	44	Glacé fruit.....	53
Customs administrative act 1890:		Glass and china ware, with metal dominant.....	194
Sections 10 and 19.....	291	Glass magic-lantern slides, toys.....	370
Sections 12 and 13.....	385	Glove leather.....	545
Section 14.....	58, 64	Gloves made of cellulose.....	86
Section 23.....	58	Gloves, unstitched.....	279
Section 19.....	312, 465, 477	Gloves, with single strands or cords.....	323
Date of exportation.....	290	Glycerin contained in "tanks or vessels".....	152
Decision, when none by a collector.....	489	Goods commingled.....	353
Declaration by seller as to character of goods..	360	Goods depreciated in value.....	61
Deer-foot handled knives.....	255	Goose skins as fur substitutes.....	321
Description eo nomine.....	198	Goose skins, not used as down.....	321
Delivery permit as to the bulk.....	189	Granite stones.....	510
Designation covering ultimate use.....	494	Great Britain, reciprocity agreement with.....	426
Dictionaries and treatises.....	82	Guncocton.....	246
Direct shipment from the Philippines.....	450	Habutal silks.....	346
Domestic wholesale price.....	484	Hair rolls (rats).....	170
Doubt resolved in favor of importer.....	198	Hamburg free zone.....	443
Dressing oil distilled from grease.....	513	Hauteville, Istrian, and like stones.....	25
Dried fish in paper packages.....	341	Hearings by Board of General Appraisers.....	527
Duck meat, prepared.....	16	Hearings, tariff, relevancy of.....	472
Ducro's Alimentary Ellixir.....	146	Hen's eggs frozen and in tin cans.....	138
Dures.....	36, 500	Herrings, kippered.....	304
Dutiable value.....	61	Hides removed abroad from cattle exported alive from the United States.....	336
Dutiable value on date of exportation.....	290	Hours of business at customshouses.....	415
Duty, rates of, where two or more are appli- cable.....	120	"Hygeia" paper.....	497
Earcaps.....	49	Imitation jet on barettes.....	457
Eggs in hermetically sealed cans.....	138	Imitation pongee silk.....	132
Eggs of fish.....	1	Imitation stones in buttons.....	542
Embroidered Chinese shoes.....	5	Incandescent burners.....	93
Entireties.....	34	India rubber from scrap refuse.....	518
Entry, refusal of.....	415	Infald linoleum.....	101
Entry sought after office hours.....	69	Internal-revenue circular, weight of.....	146
Entry sought before completion of voyage.....	107	Interpretation by the Congress inferred.....	158
Enamel or ceramic colors.....	216	Invoice, date of, in computing currency values.....	149
Enfleurage grease.....	126	Involuntary payment.....	39
Eo nomine designation prevails.....	198	Iron drums, containing glycerin.....	152
Error without injury.....	545	Jacquard figured goods.....	178
Etamines.....	64	Jam and marmalade, sweetmeats.....	144
Examination by board of three general ap- praisers required.....	385	Jewelry, what is not.....	457
Fancy brass-plated vest buttons.....	542	Judicial notice of means of intercommunica- tion.....	132
Fancy toilet soap.....	500	Kippered herrings in tin cans.....	304
Favored-nation clause.....	426	Knives, deer-foot handled.....	255
Finding of facts, made when.....	304	Lakes containing lead.....	32
Fish, caught off Newfoundland.....	515	Lambskins, dressed.....	545
Fish dried and in paper packages.....	341	Lead-bearing ores.....	472
"Fit only for such use," defined.....	513	Leather belting.....	537



	Page.		Page.
Leather, smokers' articles .....	377	Protest, sufficiency of.....	64, 206
Legal sense of commercial designation .....	15	Protests to be construed liberally.....	79
Legislative interpretation.....	158	Proviso, construction of.....	309
Legumens.....	14	Pueraria, grown in China.....	14
Linoleum, figured or plain, inlaid.....	101	Pyroxylin combs, boxes and handles.....	118
Linters of cotton.....	246	Rates of duty, two or more applicable.....	120
Lithographic prints.....	434	"Rats".....	170
Machine articles and forgings.....	550	Rattan bags or baskets.....	535
Machine tools.....	226	Reappraisal by board, when it must stand.....	408
Madras shirting.....	73	Reappraisal by consular samples.....	462
Magic-lantern slides.....	370	Reappraisal on appeal, final.....	181
Magnesia articles.....	93	"Reasons" and "grounds".....	64
Manufactures of cork.....	529	Reciprocity agreements.....	426
Maraschino cherries.....	239	Record, when may not be questioned.....	213
Marble.....	25	Records substituted.....	527
Marble, chips of, crushed and screened.....	290	Recovered oil.....	513
Marmalade and jams.....	144	Recovered rubber.....	518
Meats prepared or preserved.....	16	Refusal of entry.....	415
Melilita or lava used in making spark plugs.....	300	Reliquidation and a new protest.....	499
Memorandum of importers' valuation.....	479	Res adjudicata, assessment when.....	499
Metal drums containing creosote oil.....	312	Revised Statutes:	
Mica, unmanufactured or rough trimmed.....	257	Section 251.....	63, 71
Millboards.....	47	Section 863.....	277
Minerals, new name for process product not essential.....	506	Section 2614.....	386
Monumental stones.....	510	Sections 2899 and 2901.....	109, 389, 392
Moving picture films.....	51	Section 2904.....	291
Musk, artificial, not coal tar.....	166	Section 2930.....	386
Muguet de mal.....	126	Rhodium.....	158
Negative, force of in construction.....	309	Rice, broken, examination anew impossible.....	362
New protest on reliquidation.....	499	"Rough leather".....	379
Nonimportation.....	53	Samples, Government selected, may be relied on by importer.....	362
Office hours.....	69, 415	Samples in public stores.....	385
Olive oil.....	263	Samples, official, of goods.....	178
Omission of words in a later statute.....	216	Samples selected by the Government.....	362
Paraffin.....	205, 443	Scrap or crude rubber.....	518
Paper boxes with surface-coated paper.....	120	Sheepskins.....	272
Paper, manufactures of.....	422	Silks, boiled off.....	346
Paper, surface-coated.....	434	Silks in the gum.....	346
Paper wrappings or containers.....	309	Silk selvage in cotton cloth.....	223
Partly or fully machined articles.....	550	Silk velvet ribbons.....	439
Patent earcups.....	49	Silk, weight of.....	439
Pears' unscented soap.....	500	Silk woven fabrics, appliqued.....	297
Permit for delivery of the bulk.....	189	Skins, goose, used as furs.....	321
Personal effects, free of duty.....	134	Smokers' articles.....	194
Philippine cigars.....	450	Smoker's article, if first use of it by smoker.....	334
Photographs.....	51	Smokers' articles of leather.....	377
Picker strap and apron leather.....	537	Soap, fancy toilet.....	550
Pictorial post cards.....	82	Sparklets or sparklers.....	109
Piston rods of steel.....	550	Spark plugs.....	300
"Plate".....	31	Specific designation, controls ordinarily but not always.....	370
Polariscope test of sugar.....	228	Splittings of mica.....	257
Pongee silk, imitation of.....	132	Statutory interpretation.....	216, 300, 556
Poultry.....	16	Steel piston rods.....	550
Power of board to issue commission to take testimony.....	276	Steel strips.....	494
Prepared vegetables.....	237	Stem and cargo ginger, imported in bulk.....	113
Presentation of works of art.....	293	Stoneware ink bottles.....	477
Preserved fruits.....	287	Strawberry and apricot pulp.....	10
Presumption as to collector's finding.....	146	Straws and toothpicks wrapped in "Hygela" paper.....	497
Proceedings in customs administration.....	44	Sturgeon roe "prepared for preservation," not "preserved".....	1
Products, not of American fisheries.....	515	Substitute for coffee.....	106
Proof on test of silks in the gum.....	346	Substitution of records.....	527
Protest, insufficiency of.....	79		

	Page.
Sufficiency of protest.....	205
Sugar, polariscope test of.....	228
Sugar, rawbeet, countervailing duty on.....	242
Surface-coated paper.....	434
Surface-coated paper boxes.....	120
Sweetmeats.....	113
Tapelike belting.....	142
Tare, generally.....	316
Tare on hides.....	316
Tariff act of 1897:	
Paragraph 3.....	166, 213, 513
Section 6.....	104, 171, 280, 437
Paragraph 17.....	51
Paragraph 32.....	380
Paragraph 45.....	104
Paragraph 52.....	19
Paragraph 54.....	32
Paragraph 58.....	19
Paragraph 67.....	146
Paragraph 69.....	500
Paragraph 96.....	194, 300
Paragraph 100.....	34, 194
Paragraph 114.....	25
Paragraph 115.....	293
Paragraph 117.....	25
Paragraph 118.....	510
Paragraph 127.....	550
Paragraph 131.....	115
Paragraph 132.....	115
Paragraph 135.....	22, 494
Paragraph 148.....	29
Paragraph 155.....	255
Paragraph 193.....	22, 29, 109, 115, 337, 550
Paragraph 208.....	535
Paragraph 241.....	17, 171, 237
Paragraph 257.....	14
Paragraph 261.....	341
Paragraph 262.....	10
Paragraph 263.....	10, 113, 144, 239, 287, 328
Paragraph 275.....	16
Paragraph 306.....	223
Paragraph 314.....	49
Paragraph 320.....	49, 252
Paragraph 337.....	101
Paragraph 339.....	168
Paragraph 360.....	272
Paragraph 370.....	170
Paragraph 386.....	439
Paragraph 387.....	347
Paragraph 390.....	5, 92, 168
Paragraph 391.....	92, 178
Paragraph 398.....	434
Paragraph 400.....	82, 434
Paragraph 402.....	47
Paragraph 403.....	51, 82, 423
Paragraph 407.....	47, 422
Paragraph 415.....	353
Paragraph 418.....	109
Paragraph 419.....	506
Paragraph 425.....	321, 337
Paragraph 426.....	321
Paragraph 437.....	336
Paragraph 438.....	5
Paragraph 443.....	279
Paragraph 449.....	252, 535
Paragraph 454, section 3.....	293

	Page.
Tariff act of 1897—Continued.	
Paragraph 459.....	334, 497
Paragraph 489.....	90
Paragraph 549.....	1
Paragraph 562.....	272
Paragraph 568.....	122
Paragraph 579.....	518
Paragraph 614.....	280
Paragraph 626.....	126, 263, 443
Tariff act of 1909:	
Effective, when.....	415
Office hours.....	415
Section 5.....	450
Section 17.....	118
Section 28, subsection 18.....	309
Section 29.....	108, 190
Paragraph 90.....	400
Paragraph 91.....	257
Paragraph 107.....	370
Paragraph 109.....	457
Paragraph 151.....	152
Paragraph 181.....	472
Paragraph 193.....	472
Paragraph 195.....	309
Paragraph 197.....	226
Paragraph 256.....	138
Paragraph 272.....	304
Paragraph 315.....	556
Paragraph 318.....	73
Paragraph 320.....	73, 556
Paragraph 321.....	556
Paragraph 323.....	73
Paragraph 330.....	142
Paragraph 349.....	142, 374
Paragraph 399.....	297
Paragraph 402.....	297
Paragraph 411.....	120
Paragraph 429.....	529
Paragraph 448.....	542
Paragraph 450.....	545
Paragraph 451.....	379, 537, 545
Paragraph 452.....	377
Paragraph 475.....	377
Paragraph 481.....	120
Paragraph 548.....	246
Paragraph 567.....	515
Paragraph 709.....	134
Tomatoes, canned.....	237
Toy glass magic-lantern slides.....	370
Toys, what are not.....	109
Trade conventions.....	426
Transshipment within a country, not ex- portation.....	290
Treasury Decisions cited in opinions:	
604.....	356
667.....	356
2363.....	356
4788.....	45
6168.....	53
6225.....	356
7933.....	517
10324 (G. A. 45).....	274
10855.....	390
11580 (G. A. 755).....	224
12112 (G. A. 974).....	51
12343 (G. A. 1115).....	224

Treasury Decisions cited in opinions—Con.	Page.	Treasury Decisions cited in opinions—Con.	Page.
12350 (G. A. 1122).....	224	28044 (G. A. 6567).....	36
12828 (G. A. 1434).....	322	28217 (G. A. 6606).....	80
13816 (G. A. 2010).....	357	28291 (G. A. 6633).....	103
13864 (G. A. 2017).....	274	28294 (G. A. 6636).....	21
14696 (G. A. 2418).....	224	28298 (G. A. 6640).....	253
14909.....	374	28519.....	93
15081.....	374	28539.....	97
15479.....	517	28721.....	404
15631.....	45	28768.....	517
17623 (G. A. 3671).....	176	28833.....	490
18063 (G. A. 3885).....	274	28863.....	153
18508.....	229	29010.....	153
19263.....	206	29150.....	133
20244 (G. A. 4300).....	274	29512 (G. A. 6859).....	94
21186.....	455	29566.....	536
21428 (G. A. 4503).....	330	29696.....	536
21565.....	455	29963.....	309
21940 (G. A. 4639).....	78	30046.....	309
22176 (G. A. 4703).....	176	30528 (G. A. 7007).....	305
22414 (G. A. 4743).....	343	30770.....	121
22447.....	455	30772.....	145
22528.....	363	30776.....	211, 264, 515, 529
22604 (G. A. 4808).....	75	30850.....	361
22680.....	363	31008.....	140
22828 (G. A. 4869).....	108	31033.....	207
22918.....	372	31034.....	419
23130 (G. A. 4946).....	331, 332	31114.....	418
23131 (G. A. 4947).....	153	31116.....	145
23247 (G. A. 4981).....	274	31187.....	541
23470 (G. A. 5062).....	225	31218.....	417
23473a.....	455	31273.....	464
24308.....	221	31277.....	522
24869 (G. A. 5526).....	528	31508.....	478
24971.....	455	Treasury regulation of appraisement.....	61
25023.....	262	Treasury regulation for testing sugar.....	228
25361 (Abstract 1800).....	357, 358	Tri-nitro-iso-butyl-xylo, or artificial musk... ..	166
25384 (G. A. 5711).....	224	Ultimate use, designation covering.....	494
25510.....	455	Ultramarine blue.....	19
25878.....	225	Undressed scraps of fur.....	198
25892 (G. A. 5899).....	88	"Unwrought," meaning of.....	158
25991.....	358	Use in chief of smokers' article.....	334
26007 (G. A. 5908).....	114	Validity of preceding appraisements.....	484
26041 (Abstract 3288).....	225	Valuation by appraisers, how made.....	151
26152 (G. A. 5967).....	118	Valuation on entry that includes commis- sions.....	478
26187 (G. A. 5978).....	225	Value in chief.....	360
26312.....	514	Values in two different currencies.....	149
26733 (G. A. 6159).....	253	Vaseline.....	205
26769 (G. A. 6166).....	343	Vegetables, prepared or preserved.....	17
26866.....	118	Wall pockets.....	422
27054 (G. A. 6272).....	105	Wearing apparel, personal effects.....	134
27289 (G. A. 6339).....	249	Weight of commodities, how determined.....	439
27328 (G. A. 6360).....	65	Westrumite asphalt.....	400
27382 (G. A. 6374).....	461	Wheat, boiled, dried, and broken.....	437
27536 (G. A. 6406).....	84	Wistaria bags or baskets.....	535
27633 (G. A. 6449).....	33	Works of art for presentation.....	293
27682 (G. A. 6470).....	263	Woven silk fabrics.....	439
27760 (G. A. 6490).....	36	Yams.....	14
27871 (G. A. 6531).....	345	Zinc-bearing ores.....	472
27891.....	509		
27971 (G. A. 6503).....	199		
28018 (G. A. 6560).....	105		

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Ex 37









